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In the Supreme Court of the United States

No. 353

OCTOBER TERM, 1962.

TERESA GRISANTI, etc.,
Plaintiff-Appellant,

vs.

THE CITY OF CLEVELAND, et al.,
Defendants-Appellees.

APPEAL FROM THE SUPREME COURT OF OHIO AND FROM THE COURT OF APPEALS OF CUYAHOGA COUNTY, OHIO.

JURISDICTIONAL STATEMENT.

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APPEAL FROM THE SUPREME COURT OF OHIO AND FROM THE COURT OF APPEALS OF CUYAHOGA COUNTY, OHIO.

JURISDICTIONAL STATEMENT.

Appellant appeals from the judgments of the Supreme Court of Ohio rendered in this case on May 9, 1962 wherein it dismissed the appeal as of right filed therein from the judgment of the Court of Appeals of Cuyahoga County, Ohio entered on March 12, 1962 and also on May 9, 1962 overruled the plaintiff-appellant's motion for an order directing the Court of Appeals of Cuyahoga County to certify its record to the Supreme Court of Ohio. Judges Taft and O'Neill dissented from the judgment of dismissal. An application for rehearing of the orders of the Supreme Court was denied by it on June 13, 1962 and on June 21, 1962, notice of appeal to the United States Supreme Court with proof of service was duly filed in the Supreme Court of Ohio.

This statement is submitted for the purpose of showing that the Supreme Court of the United States has jurisdiction to hear this appeal and that a substantial question is presented.

OPINIONS BELOW.

The opinion of the Court of Common Pleas of Cuyahoga County is reported in 18 O. O. (2d) 143, but is set out herein as Appendix "A." The opinion of the Court of Appeals of Cuyahoga County, Ohio is reported in 89 Ohio Law Abstract, page 1 and is annexed hereto as Appendix "C." The Supreme Court of Ohio wrote no opinion. (For convenience, the Appendix hereto has been printed under separate cover.)

JURISDICTION.

(i) This action was brought at common law by petition for injunction and other relief in the Court of Common Pleas of Cuyahoga County, Ohio.

(ii) A copy of the judgment of the Common Pleas Court entered November 27, 1961 is attached hereto as Appendix "B." The date of the judgment of the Court of Appeals of Cuyahoga County, Ohio, Eighth District, here sought to be reviewed is March 12, 1962. A copy of the entry of that Court is attached hereto as Appendix "D."

On March 29, 1962, appellant filed her Notice of Appeal to the Supreme Court of Ohio as of right on constitutional questions and also on condition that a motion to certify the record be allowed. The May 9, 1962 Journal Entry of the Supreme Court of Ohio dismissing the appeal as of right and overruling the motion to certify the record is attached hereto as Appendix "E" together with its Journal Entry of June 13, 1962 denying the application for rehearing. On June 21, 1962, Notice of Appeal to the United States Supreme Court was filed in the Supreme Court of Ohio.

(iii) Jurisdiction is conferred upon this Honorable Court by virtue of the terms of Section 1257 (2) of the

Judicial Code, 28 U. S. C. Section 1257 (2) which provides as follows:

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

'(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.' "

(iv) The cases believed to sustain the jurisdiction of the Supreme Court of the United States to hear this case are:

(A) Appellant has been denied due process of law guaranteed by the Fourteenth Amendment of the Constitution of the United States by:

(a) failure to give notice prior to the enactment by the City of Cleveland of an ordinance to allegedly establish its right to condemn her property by eminent domain. *Lambert vs. California*, 355 U. S. 225; *Mullane vs. Central Hanover Trust Company*, 339 U. S. 306; *Covey vs. Town of Somers*, 351 U. S. 141; *Walker vs. Hutchinson City*, 352 U. S. 112; *Scott vs. McNeal*, 154 U. S. Page 34.

(b) Where, by the finding of facts by a state court, a federal right has been denied as a result of a finding shown by the record to be without evidence to support it. *Fiske vs. Kansas*, 274 U. S. 380, 385; *Northern Pacific Railway vs. North Dakota*, 236 U. S. 585, 593; *Aetna Life Insurance Company vs. Dunken*, 266 U. S. 389, 394.

(c) In determining that the expropriation of plaintiff's private property was for a public use and not for a private use. *Cincinnati vs. Vester*, 281 U. S. 439; *Sears vs. City of Akron*, 246 U. S. 242, 251.

(v) This appeal draws in question the validity of Ordinance No. 2428-60 of the City of Cleveland which is annexed hereto as Appendix "F," and the applicability of 42 U. S. C. § 1460(c) Public Law 86-372, Title 413, 73 Stat. 675, 677, as amended Sept. 23, 1959 and as in effect at the times herein concerned (Appendix H).

QUESTIONS PRESENTED BY THIS APPEAL.

(1) May the adoption of an urban renewal plan by a municipality be the means of depriving a landowner in the Northwest Territory of the right of judicial proceedings according to the course of the common law and deprive him of his property,—but by the judgment of his peers or the law of the land—where the public exigencies do not make it necessary for the common preservation?

The foregoing rights having been granted to the plaintiff in the Northwest Ordinance, captioned the "Ordinance of 1787" adopted by Congress July 13, 1787 and having never been altered by common consent between the original states and the people in the states in the Northwest Territory, a copy of which Ordinance is attached hereto as Appendix "G."

(2) In an injunction filed by a taxpayer landowner to enjoin the alleged illegal appropriation of her property as part of a slum clearance project, is evidence admissible in support of her averments that:

> (a) The area in question is not an area blighted, deteriorated or deteriorating, nor detrimental to the public health, safety or welfare and any such finding or determination by the defendants was arbitrary, capricious, contrary to law, and constituted an abuse of discretion and of the powers of the defendants.

(b) That the threatened taking of plaintiff's property by the exercise of eminent domain was for a private and not for a public use.

(3) May a municipality legally appropriate property of a landowner with the use of federal funds as part of an urban renewal project where approximately 80% of the land in the project area is vacant and only a small portion of the structures are sub-standard and the so-called urban renewal area is not predominantly residential in character?

(4) Is property of a landowner being taken for a public purpose where no domination thereof is exercised by the condemning municipality but actually a contract to sell the landowner's property is entered into with a private corporation for profit before the land is actually owned by the municipality?

(5) Are a landowner's due process rights violated by a final determination by a municipality that her land may be appropriated by the exercise of eminent domain where the determination, which is a necessary predicate to attempting such appropriation, is made, that the area in which her land is located is blighted, deteriorated or deteriorating, without affording the landowner any opportunity to present any evidence thereon, to examine any witnesses with reference thereto and without giving the landowner any prior notice whatsoever of a hearing at which such determination was made?

(6) May a municipality legally enter into a loan and capital grant contract with the United States of America to procure and use grants and funds of the United States for the appropriation of a landowner's property and to be used in an alleged urban renewal development where the project area is not predominantly residential in character?

STATUTES AND CONSTITUTIONAL PROVISIONS.

This case involves the Fourteenth Amendment of the Constitution of the United States, Section 1, the pertinent portion of which reads as follows:

> "* * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any persons within its jurisdiction the equal protection of the laws."

It also involves the said Northwest Ordinance (Appendix "G"); that portion of the Fifth Amendment of the United States Constitution providing: "* * * nor shall private property be taken for public use without just compensation" and the Fourth Amendment which provides:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supporting by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

STATEMENT OF THE CASE.

1. THE FACTS.

The parties are referred to as they appeared in the trial court. This is an action in injunction commenced in the Cuyahoga County, Ohio, Common Pleas Court by the plaintiff individually and as a citizen and taxpayer of the City of Cleveland, Ohio. A request to bring this action had been previously rejected by the Director of Law of the City of Cleveland.

For a great number of years, plaintiff has resided in and been the owner of the real property described in her petition. This is located in the area which constitutes hereinafter described Erieview Project No. 1; it consists of a masonry commercial and residential structure at 1205 St. Clair Avenue, Cleveland, Ohio.

An appropriation action against plaintiff's property was filed in the Common Pleas Court of Cuyahoga County by the defendant, City of Cleveland.

It is contended that Erieview Project Area 1 is an area blighted, deteriorated or deteriorating as defined in Cleveland Ordinance 1.5102; that an ordinance and resolution to that effect were adopted by the defendant, City Council and the City Planning Commission and a plan for the renewal thereof was approved by those bodies. (Ordinance No. 2428-60 Appendix "E.")

This plan provided that the City of Cleveland should purchase (or appropriate, if necessary) and demolish every structure in this "so-called slum" area with a few exceptions. The land was then to be sold for private business uses. The area is generally bounded by Lakeland Freeway on the north, approximately East 14th Street on the East, Chester Avenue on the south and on the east by East 9th Street between Chester Avenue and Superior;

by a line about 200 feet west of East 9th Street between Superior and St. Clair Avenues; by 6th Street between St. Clair and Lakeside Avenues and by East 9th Street between Lakeside and Lakeland Boulevard.

Only thirty-four families live in the ninety acres embodied by this area. 429 separate businesses are located there. The "Plan" says that all are to go. Approximately 80% of the area is vacant land.

Plaintiff's action was one asking that defendants be temporarily and permanently enjoined and restrained from expending any public funds for the appropriation of the plaintiff's premises and any premises located in the said Erieview Project No. 1; that the defendants be enjoined and restrained from attempting to prosecute or continuing to prosecute the said application to assess compensation; that any action heretofore taken by the defendants with reference to the attempted appropriation be found to be null and void and for such further relief as is equitable.

It was plaintiff's contention that the attempted taking of her property is for the primary purpose of enabling the erection of a new, privately owned office building, apartment houses, restaurants and other places of business; that any determination or claim that the area was one which was blighted, deteriorated or deteriorating as defined by Ordinance 1.5102 is contrary to fact and any such determination was arbitrary, capricious and constituted a gross abuse of discretion by defendants; that the proceedings taken were merely a device to permit the utilization by the City of Cleveland of the exercise of its right of eminent domain in order to procure land upon which new privately owned buildings could be constructed—none of the land, except a small area across from the City Hall, is to be used for new public buildings.

It is plaintiff's position that the primary purpose for the appropriation proceeding is to provide lands for the erection of new office buildings and private places of business and any public welfare resulting from the taking of this land is minutely secondary—if at all; that the taking is definitely not for the purpose of slum or blight elimination—since this is not a slum or blighted area.

Evidence of the fact that plaintiff's land is not being taken for a public use is reaffirmed by the action taken by the defendants in actually agreeing to sell plaintiff's own property to a private developer for private purposes even before they owned it.

An important issue; therefore, that the pleadings put into issue, was whether or not the defendants acted arbitrarily and abused their discretion by making findings contrary to fact in order to frustrate the law and provide a device whereby they could subsequently attempt to appropriate plaintiff's property.

The answer admitted that no notice whatsoever was given to anybody by the Council of the City of Cleveland prior to the adoption of its ordinance. The only notice of any kind was that given by the Planning Commission ten days prior to the time set for the unveiling of its plan for renewal of this area. This was set for November 22, 1960.

However, this notice, which is defendants' Exhibit "D" (Original Bill of Exceptions) herein not only did not afford this plaintiff or any other property owners a right to be heard with reference to whether or not this was a slum area—a necessary prerequisite before adopting a renewal plan, but the notice actually stated that such a determination had *previously* been made by the City Planning Commission. We quote from the notice:

> "The Cleveland City Planning Commission has heretofore determined the above described area to be

both blighted or deteriorated or deteriorating area within the definition of Section 1.5102 of the codified ordinances of the City of Cleveland."

The pleadings and evidence further established that the defendant, City of Cleveland, had, prior to any action herein, entered into an agreement in writing to sell plaintiff's property to the Erieview Corporation, a private Ohio corporation for profit. This contract, which is in evidence, provides that the land in question must be used for the construction of a 40-story privately owned, operated and maintained office building for the private benefit of the said Erieview Corporation. Such facts were further admitted and stipulated into evidence.

Plaintiff's petition describes this process of getting her private property to the Erieview Corporation as "conduiting" her property to that corporation. The conduit, of course, is the City of Cleveland; from a private citizen to a big private developer—through the City of Cleveland.

At R. 217, the City admitted such intended transferring of plaintiff's property:

> "The Court: Conduiting it in, but it is a good word, conduiting it from one private person to another private person for a private purpose.
>
> Mr. Lansdale: I appreciate that, sir.
>
> The Court: That is more or less admitted, is it not?
>
> Mr. Lansdale: Oh, yes. * * *
>
> The Court: Well, I think the answer admits it is taken for private use of a business, private business, not a public.
>
> Mr. Lansdale: There's no question about that, Judge."

The trial court, however, refused to permit any testimony in support of the averments of plaintiff's petition that the area in question did not qualify as a slum or

blighted area so that the right of eminent domain would not be applicable herein and that any determination of such fact by the defendants was arbitrary, capricious, contrary to fact and constituted a gross abuse of discretion.

Plaintiff's constitutional right to seek redress to the courts in this respect was substantially deprived her. This ordinance, purporting to have been enacted to protect the public health, morals or safety has no real or substantial relation to those objects and the evidence, if permitted, would have shown, beyond all question, that it constituted a plain, palpable invasion of rights secured by Federal law, and is repugnant to the U. S. Constitution and congressional enactments.

Federal law in this respect is contained in the Ordinance of 1787 (Appendix "G") adopted by Congress July 13, 1787, which provided for "An ordinance for the government of the territory of the United States northwest of the river Ohio." This included the territory which now comprises the State of Ohio. It provided fundamental protections for the people in this area.

Section 14 provided as follows:

"It is hereby ordained and declared, by the authority aforesaid, that the following articles shall be considered as articles of compact between the original States and the people and States in the said territory and forever *remain unalterable unless by common consent*, to-wit:

ARTICLE II.

The inhabitants of the said territory shall always be entitled to the benefits of the writs of habeas corpus, and of the trial by jury; of a proportionate representation of the people in the Legislature, and of judicial proceedings according to the course of the common law. All persons shall be bailable, unless for capital

offences, where the proof shall be evident, or the presumption great. All fines shall be moderate and no cruel or unusual punishments shall be inflicted. No man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land, and should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same. And, in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made or have force in the said territory that shall, in any manner whatever, interfere with or affect private contracts, or engagements, bona fide and without fraud previously formed."

This compact has never been altered by common consent and is still as much in full force and affect, in providing protection for the citizens of what is now the State of Ohio, as it did in 1787.

Attention is called to the fact that this compact, which is in the nature of a superconstitution, only permits the taking of private property when it would be for the "common preservation", and inhabitants shall be entitled to "Judicial Proceedings according to the course of the common law." This is certainly not the situation in this case.

The Court refused to hear any evidence as to the ineligibility of this area for urban renewal and disregarded the fact that no notice was given plaintiff prior to finding the area to be a slum or blighted area.

It was important that the Court accept evidence as to whether the area involved herein *was* or *was not* a slum or blighted area. This was offered as bearing upon the question the court was called upon to determine as to whether defendants were attempting to take plaintiff's property for a private use.

The only public use or public welfare (as claimed by the defendants) involved in this taking was such as would result from the elimination etc. of a slum or blighted area. If the evidence showed that the area was not slum or blighted and, therefore, such elimination was not involved, then no public use or public welfare resulted from the taking. If the taking was not primarily for the public use or public welfare, it would necessarily be for the only other basis for a taking—a private use.

The Court, upon finding from the evidence, that this taking was not for the purpose of slum elimination—because it did not exist—would be obliged to grant the plaintiff's petition.

Because the trial court here refused to hear any such evidence either as it applied to the use for which the property was being taken or as bearing upon whether the Council and City Planning Commission acted arbitrarily and capriciously and in an abuse of discretion in adopting the ordinance and resolution in question, it committed error,—and deprived her of constitutional rights.

In refusing all such testimony, the Court said (R. 169):

> "The Court: Suppose the Council acted on false information?
>
> The cases are clear that the Court cannot go beyond the legislative act. I can't get away from it, Mr. McMonagle.
>
> It's a hard rule, granted, but yet there is logic in it because, after all, the Council has the right to be the judge of its actions, and if it makes a misjudgment, I may not agree with what they did—I may feel it is a big mistake to tear down the Auditorium Hotel and I may not see any reason for it at all but, yet, I am not entitled to go into that and I am not entitled to go into these facts upon which Council based its

conclusion that it should take action and on which it did not take action.

I am convinced of that; I just can't get away from that."

The same results were had upon attempting to elicit testimony from the planning expert (R. 179), Mr. Alfred C. Grisanti, whose qualifications were acknowledged.

R. 205:

"The Court: I think he's an expert in this field. He's well qualified."

However, the Court refused to permit the witness to testify that a preponderance of the structures in this area were not detrimental to public health, safety or welfare.

The witness was also prohibited from testifying that there was not a preponderance of defective or inadequate street layout in this area at the time in question.

The witness was further prohibited from stating, in his opinion, that there was not a predominance of defective or inadequate street layout or faulty lot layout with relation to size, adequacy, accessibility or usefulness or unsanitary or unsafe conditions or deterioration of site improvements (R. 208).

The witness was further prohibited from testifying as to whether there was a preponderance of conditions which endanger life or property by fire or other causes present in that area.

The witness was further prohibited from testifying that the area did not contain obsolete or substandard structures or incompatible land uses which retard the provision of necessary housing conditions or constitute an economic or social liability or a danger to the public health, safety, morals or general welfare of the area's condition and use.

The witness was further prohibited from testifying that the sale of his mother's property to Mr. Galbreath for his private use did not, in any way, contribute to any public welfare.

In the within case, the Court refused to hear any evidence that would, in any manner impeach the determination by the City Council that the property in question was blighted. The Court and parties concerned stated that they recognized the law to be that such a determination by the City Council was final unless the determination was arbitrary, unreasonable and constituted a gross abuse of discretion.

The petition of the plaintiff herein definitely and specifically averred that the action of the Council was contrary to fact and was arbitrary, unreasonable and constituted an abuse of discretion.

It is elementary that a determination which was actually contrary to fact would constitute an arbitrary, unreasonable act and such determination would constitute a gross abuse of discretion. As is indicated in the cited authorities, reviewing courts have held that actions by inferior courts constituted an abuse of discretion. Various courts have held that enactments by the legislature and the City Council were so unreasonable and unrelated to the public health, safety and welfare so that the Courts have set them aside as being unconstitutional. However, before a determination was made that the action was arbitrary, unreasonable and constituted a gross abuse of discretion, the Courts looked into the facts. In other words, they took testimony to determine actually what the true facts were. The legislative body could not be held to contend that two plus two equals four merely because they so determine that to be a fact. In practically

every instance, the Court, where it is asked to determine that the finding of a legislative body was unconstitutional, accepted evidence bearing on the fact in issue. The trial court in this case refused to so do.

While the evidence should have been permitted by the Court as bearing upon the question as to whether or not the action of the City Council was arbitrary, capricious, unreasonable and constituted a gross abuse of discretion, it further should have been admitted as bearing upon the question as to whether or not the taking was for a public use. The question "What is a public use?" is a judicial one. The trial court admitted evidence of the fact that the 40-story office building to be built on plaintiff's property was to be a private enterprise. Evidence as to the type of and the conditions existing in the area should also have been properly admitted as providing evidentiary basis to the court upon which to make a determination as to whether or not the use was to be private or public. If the area and the structures therein were not such as were detrimental to the public health, safety and welfare, then the only logical finding the Court could make would be that the purpose for the taking and the use to which the property was subsequently to be put was private and its taking illegal. If the conditions were shown to be such that their taking did not eliminate slums etc. because slums did not exist, then the taking would, therefore, be not primarily public and must be entirely private. It was obviously prejudicial, reversible error for the Court to refuse to hear any evidence whatsoever with respect to the condition of the area, whether slum, blighted, residential, industrial, etc.

There is no question from the law that under the averments of the pleadings and the circumstances in this case that the Court should have admitted evidence as to

whether or not the Council acted arbitrarily and abused its discretion in adopting the ordinance that has the effect of permitting the appropriation of the Grisanti property. As previously indicated, this is for two reasons: one as to whether or not the property is going to be taken for a public use and the other as to whether or not the Council acted arbitrarily in the adoption of this ordinance. The first basis is, of course, a matter that can always be judicially inquired into. The second may be judicially inquired into if there is an averment of a gross abuse of discretion which exists in the within case. The only manner in which the Court could determine as to whether there was such a gross abuse of discretion was to hear the evidence as to the facts.

In *Sargent v. City of Cincinnati*, 110 Ohio St. 444, 144 N. E. 132, the court says, at page 451:

> "All these legislative functions relate to the necessity and exigency of the taking, but owners of private property may judicially inquire whether the specified use is a public use or whether such use will justify or sustain the compulsory taking of private property, and even though the legislative authority has declared the use to be a public one, *the courts may properly inquire into the good faith of such declaration and whether there has been a manifest abuse of power.*" (Emphasis added.)

In evaluating an ordinance in the light of constitutional provisions, the pronouncement of the Supreme Court of the United States, in *Jacobson v. Commonwealth of Massachusetts*, 197 U. S. 11, 49 L. Ed. 643 is applicable:

> "* * * If there is any such power in the judiciary to review legislative action in respect of a matter affecting the general welfare, it can only be when that which the Legislature has done comes within the rule that, if a statute purporting to have been enacted to

protect the public health, the public morals or the public safety, has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge and thereby give effect to the Constitution."

Mumpower vs. Housing Administration of Bristol, 176 Virginia 426, 11 S. E. 2d 732. In this action, the Court clearly indicated that where a pleading raised the question as whether or not the legislative action was arbitrary or unreasonable, evidence bearing upon such allegation was properly admissible. The Court in that case said:

"There is nothing in the pleadings to suggest that the legislature acted arbitrarily or unreasonably. Its enactment must be sustained unless 'it is clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare.'"

In *Shenk v. City of Pittsburgh*, 364 Pa. 612, the Court held that in the absence of an indication that the City Planning Commission did not act in good faith, or was wholly arbitrary in certifying an area for removal, that the certification of that area was not subject to judicial review. However, where an averment was made that the planning commission was arbitrary in certifying the area, a judicial inquiry thereon should properly be taken and judicial determination thereof would be made from the evidence adduced at the trial.

It is fundamental that all citizens have ultimate recourse to the courts for redress of wrongs suffered them by actions of legislative bodies. It is an elementary principle of law that there is at least one appeal available in every action affecting the right of an individual. This is either by way of a specific statutory appeal, mandamus, pro-

hibition, procedendo or injunction. In the instant case, while it is stated that the plaintiff's rights are protected by means of an injunctive proceedings, this becomes meaningless when a litigant is prohibited from introducing evidence in support of the averments which, if proven, would give the relief to which she is entitled. The Court's action is repugnant to the Northwest Ordinance of 1787.

Eminent authority holds that the trial court erred in not permitting the proffered evidence.

In *Bahr Corp. v. O'Brion*, 146 Conn. 237, 149 A. 2d 691 (1959), the Supreme Court of Errors held that where the owner contended that taking was for a private, not a public purpose, and that the inclusion of owner's property within redevelopment area was unreasonable, arbitrary, discriminatory and an abuse of agency's powers, redevelopment agency determinations are subject to judicial review to discover if they are unreasonable or in bad faith or are an abuse of the power conferred and that the trial court erred in refusing to admit the proffered evidence and remanded the case for a new trial.

Bahr owned business property in downtown New Haven included in a ninety-six acre project, and situated in a choice retail location. The project site included the four highest priced blocks in downtown New Haven. Called the Church Street Project, the total redevelopment cost was estimated at $85 million in federal, state, local and private capital. One of the project's avowed aims was to stimulate lagging business in the commerical center of the city, to lure back the consumer from suburban shopping centers, and thus to bolster declining downtown land values and prevent the subsequent tax losses to the city.

The *Bahr* decision may be implicitly based on the inadequacies of the present system in urban redevelopment projects. The public hearing required by redevelopment

statutes, unlike the judicial-type hearings conducted by traditional administrative agencies, afford little or no protection to affected property owners. An agency invests thousands of dollars and man hours in planning and preparation prior to the public announcement of a project and hearing, expenditures which can produce officials committed to a project before the public and affected property owners have had any opportunity to voice any opposition. A redevelopment campaign which could resolve the political future of its official advocates does not encourage maximum agency impartiality. The close co-operation between private developers and the local agency during the formative stages of project planning and administrative considerations which demand the rapid and unhindered transition of a project from planning to execution greatly influences agency open-mindedness when a project comes up for approval.

With insufficient resources, short notice and no subpoena power, an objecting property owner is unable to prepare any adequate challenge at a public hearing.

The Court, at page 697 of the *Bahr* opinion, states:

> "The agency has asserted that an early determination of the questions raised by these appeals is of great importance to the public. If that is true, it is unfortunate that, during the trial, the agency resisted every effort by the plaintiff to introduce evidence to prove that its property was being taken for a private use rather than a public one, or that the taking of it was unreasonable or an abuse of the power conferred upon the agency. Of course, as in any case where a new trial is ordered because the court erred in excluding evidence, we cannot say that if the evidence which was offered had been received the court would have concluded that the plaintiff had sustained the burden of proving its allegations. The agency, however, must

assume at least part of the responsibility for the delay which will be caused by the necessity for a new trial."

To protect the property owner for the compilation of an adequate record for review, the trial court is now the only forum available where the property owner has rights with power to subpoena, swear, and cross-examine witnesses, in order to determine if the planning commission or urban renewal agency did reasonably support its findings in all respects.

The Court, in the *Bahr* opinion, cites three cases that the redevelopment agency determinations are subject to judicial review. *Gohld Realty Co. vs. Hartford*, 141 Conn. 135, 156, 104 A. 2d 365, 371; *Water Commissioners vs. Johnson*, 86 Conn. 151, 159, 84 A. 727, 730; and *Connecticut College vs. Calvert*, 87 Conn. 421, 424, 88 A. 633, 635.

Other courts have held that land owners raise a fully triable issue when they deny that the site is substandard, and if they allege also that its selection was arbitrary or in bad faith. *Offen vs. City of Topeka*, 186 Kansas 389, 350 P. 2d 33 (1960), at page 35:

"In the instant case, the plaintiff's property is being taken and demolished for the purposes of an urban renewal plan. It is not the property of the general public that is being taken, and the general public has no particular interest in the individual property of the plaintiffs. Plaintiffs allege that the action of the Commission in passing the two resolutions taking their property was arbitrary, capricious, illegal and unlawful, and the resolutions were therefore void. Under such circumstances, we have held that where a private citizen is likely to be injured in some special manner or whose situation is peculiarly affected by the exercise of usurped authority, he may maintain an action for injunctive relief."

At page 36, the Court concluded:

"The facts here appear to be a matter of public, as well as private, concern and are of vital importance to both. The remaining questions, in the very nature of their character and importance, are ones that should not be determined in the absence of a full disclosure of all the pertinent facts. It would be well for the parties to join issues by proper pleadings and to have the case tried on the merits. * * *"

In recent years, at least one area designation has actually been invalidated, accentuating a discernible trend towards expanded review of redevelopment condemnations. *Bristol Redevelopment & Housing Authority vs. Denton*, 198 Va. 171, 93 S. E. (2d) 288 (1956). The Court said, at page 294:

"We come then to the question, Does the evidence warrant the finding of the lower court that the area as a whole is not in fact a slum, blighted or deteriorated area. * * * For the reasons hereinafter stated, we conclude that it does.

The record shows that a large number of witnesses testified on the subject. In its written opinion, the lower court commented on the fact that it had heard the testimony of one or more persons with respect to 'practically every parcel in the area.' Moreover, the opinion shows that the lower court had carefully inspected the area and was acquainted with its nature. In passing on the sufficiency of the evidence, we view it in the light most favorable to the lower court's finding which has settled all conflicts.

At page 295, the Court concludes:

"It thus appears that the basic contention of appellants is that the area as a whole qualifies for redevelopment because it is a 'blighted or deteriorated' area as defined in section 39-49 (1). *Since the evidence clearly shows* that the area as a whole does not meet that statutory definition, it necessarily follows

that the action of the local Authority in finding that because of this condition the property should be acquired for redevelopment purposes, and the action of the council on approving the project, were devoid of legal authority, arbitrary and unwarranted. Consequently, the appellees were entitled to the relief prayed for in their bill.".

The proceedings established that the attempted appropriation of plaintiff's property is not for a public use even though the Court refused to hear evidence as to the makeup of the area involved. The plaintiff was entitled to a decree in her favor on this phase of the matter, with what admissions were made by the defendant and such evidence as was admitted, and the fact that the defendants offered no testimony—only copies of some self-serving enactments.

Mr. Ralph Locher, Director of Law of the City of Cleveland, counsel for the defendants in this case, in his opening statement to the Court made the above contention:

"We call it urban renewal and we are talking about urban renewal in this case. We are talking about many aspects of urban renewal which have been accomplished over the years, and this is not the first time that we are using the *device* of urban renewal in this community, nor the first time that we have acquired many, many parcels of land to be transferred to a private developer because unless we can create an accumulation of land, you cannot enter upon an enterprise which will substantially improve the economic and commercial life, as well as the living accommodations of a great city. *That* is the *process* that is being used by the City of Cleveland. * * *"

Webster's Dictionary defines "device" as follows:

"1. a thing devised; plan; scheme

2. an underhanded scheme; trick

"to one's own device—allow to do as one wishes."

The right of exercising eminent domain does not prevail in a case such as the instant one where the facts indicated that there are only a very small percentage of structures that were substandard and that the total area (exclusive of streets that are not to be disturbed) consists of 3,165,142 square feet of land; that of this area, 2,524,335 square feet or 79.7% have no structures thereon; the area being zoned semi-industrial, with practically no residences. These figures are taken from the maps that are in evidence.

Mr. James Lister testified that a contract had been entered into to sell plaintiff's land prior to the time of its appropriation.

The City of Cleveland has actually divested itself of our land, even before it owned it, by entering into an apparently enforceable contract to sell it to the Erieview Corporation for private purposes, immediately upon gaining title to it.

It is elementary that the contract for the sale or purchase of real property is the basic controlling instrument between parties.

Defendants and the Erieview Corporation, by this device, firmly, finally and conclusively eliminated any valid contention that our property is being taken for a public use.

There cannot be any public use or purpose in the taking land when, while the title is still in the plaintiff's name, a private corporation has been already given the use, domination and control thereof by the contract already concluded between the City of Cleveland and the Erieview Corporation.

The taking of title to our land by the City of Cleveland is merely a fiction;—it actually constitutes a conduit or a means of attempting to convey plaintiff's right and ownership directly to another private individual.

Equitably, the City of Cleveland will never be the owner of our property.

Equitably, between the City of Cleveland and the Erieview Corporation, the Erieview Corporation is already the owner.

Certainly, when basic constitutional rights of a citizen are involved, the Court will never countenance such a subterfuge or, as an elementary proposition of law, close its eyes to obvious facts by permitting that to be done indirectly which could not be done directly. If the Cleveland appropriating ordinance were to say that the purpose of the taking was to turn it over to the Erieview Corporation for a privately owned office building, the injunction would be automatic.

Actually, the City of Cleveland is pretending our property is to be appropriated to eliminate conditions detrimental to the public health, safety or welfare when actually, under circumstances bearing no relationship to the conservation of public health, welfare, morals or safety. The City of Cleveland is using the "device" of urban renewal to eliminate small businesses by the accumulation of relatively small parcels of land into large tracts so as to provide adequate land for the construction of a private office building by a private corporation.

Counsel for the defendants will look in vain for any authorities to sustain this abuse of defendants' powers and the attempted infringement of plaintiff's rights. Fundamental law prohibits the use of this device.

Plaintiff possesses basic constitutional rights. These include protection of a citizen from the government and

are included in the following sections of the United States Constitution:

Amendment IV:

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supporting by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

Amendment XIV, Section 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Amendment V:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for *public* use without just compensation."

In *Cincinnati vs. Vester*, 281 U. S. 439, the Court said:

"In considering the application of the 14th Amendment to cases of expropriation of private property, the

question what is a public use is a judicial one. *Sears vs. City of Akron*, 246 U. S. 242, 251."

At page 447:

"Under Article XVIII, Section 10 of the Ohio Constitution which provides that a municipality in appropriating property for a public use may 'in furtherance of such public use' appropriate an excess over that actually to be occupied by a proposed improvement, and under No. 3679, General Code of Ohio, which requires that in the making of an appropriation there shall be a resolution of the municipal council 'defining the purpose of the appropriation' etc., a condemnation of private land in excess of that taken for widening a street cannot be sustained where its purpose is stated in the resolution only as being 'in furtherance' of the widening of the street and 'necessary for the complete enjoyment and preservation of said public use' and where a like general, but no specific explanation of purpose is in the ordinance providing for the excess appropriation."

At page 448:

"The power conferred on a municipal corporation to take private property for public use must be strictly followed."

At page 449:

"Questions relating to the constitutional validity of an excess condemnation by a city should not be determined upon conjecture as to the contemplated purposes when the object of the excess appropriation is not set forth as required by the local law."

"This was a suit brought by the owners to restrain the appropriation of their property by the City, upon the grounds that the taking was not in accordance with the applicable provisions of the Constitution and the statutes of Ohio and would constitute a deprivation of property without due process of law in viola-

tion of the 14th Amendment, it being alleged that the appropriation was not for a public use.

Under the law of Ohio these questions can be raised only by injunction proceedings. P. C. C. & St. L. Railway Co. vs. Greenville, 69 O. S. 487, 497; Sargent v. Cincinnati, 110 O. S. 444.

Decrees in favor of plaintiffs for a permanent injunction were entered in District Court and affirmed by the Circuit Court of Appeals. 33 F. (2d) 242. This Court granted writs of certiorari. 280 U. S. 545.

The plaintiffs alleged in their bills of complaint that the excess condemnation is a 'mere speculation upon the anticipated increase in the value of the properties adjacent to said improvement' and that the properties were taken 'with the design of reselling the same at a profit to private individuals to be used for private purposes, and no use of said property by or for the public is intended or contemplated.'

The answers of the City denied these allegations and summed up the position of the City by saying that the application of the principle of excess condemnation in these cases would enable the City:

1) 'to further the appropriate development of the south side of Fifty Street' by using or disposing of the excess properties in tracts 'with such size and such restrictions as will inure to the public advantage' and

2) that the increase in value of the properties in question which may accrue by reason of the improvement contemplated by the City 'will pay in part the heavy expenses to which the City will be put in effecting the improvement.' "

The Court's holding was that such a taking as was attempted was in violation of the 14th Amendment, and the plaintiff's decrees in the lower courts were affirmed.

The facts in the instant case are more aggravated but demand the same decree. In the *Vester* case, the City had not already sold the property before it procured it.

The rule in Ohio, as elsewhere, is that the power conferred upon a municipal corporation to take property for public use must be strictly followed. *Roosevelt Hotel Building Co. vs. Cleveland*, 25 O. A. 53, 63, 64; *Farber, et al. vs. City of Toledo*, 104 O. S. 196, 200.

Whether the taking is for public purposes or public welfare is to be determined by the Court from the evidence. Obviously, all the facts surrounding the taking or pertinent to it must be taken into consideration. The cases of *State, ex rel. Bruestle vs. Rich*, 159 Ohio State, page 13 and *Berman vs. Parker*, 348 U. S. page 26 were admittedly only concerned with the actual elimination of slums as such, but also provided low cost housing—a worthy public purpose. Slum clearance and the providing of adequate housing are obviously directly related to the conservation of public health, welfare, morals and safety.

Under no stretch of the imagination can the construction of this office building have that relationship. The elimination of a man's job is definitely so related.

We are, therefore, herein directly concerned solely with the use to which the property is to be put.

The *Vester* case, *supra*, has demonstrated the requirement that constitutional and legal provisions providing for the protection of rights of citizens are to be strictly construed in favor of the citizen.

Pontiac Improvement Co. vs. The Board of Park Commissioners of The Cleveland Metropolitan Park District, 104 Ohio State 447:

> "Syl. 1: The right of eminent domain belongs to the sovereign power, and statutes delegating authority to exercise it must be strictly construed. When it is sought to take the property of an individual under statutes granting such authority to corporations, subject to conditions specifically set forth, the protection of the constitutional guaranty of the right of private

property requires that the powers granted by the legislature be strictly pursued, and where the authority granted is to acquire a fee or lesser interest the term 'lesser interest' cannot be construed to mean authority to prescribe regulations from time to time as to the manner in which the property may be used or improved by the owner while he is in possession."

We submit that the evidence clearly establishes that the use to which plaintiff's property is to be put is a private one.

In the case of *Cooper vs. Williams*, 5 Ohio 391, the Court held that the authority of the canal commissioners to take private property "* * * must be exercised without doing the owners unnecessary damages and for the purpose of the canal alone."

In *McQuillan vs. Hatton*, 42 Ohio State 202, the Court said, at page 204:

"Article I, Section 19 of the Constitution provides that 'private property shall ever be held inviolate, but subservient to the public welfare'; thus placing beyond question, that private property cannot be taken for a mere private use. *McArthur vs. Kelley*, 5 Ohio 139; *Shaver v. Starrett*, 4 Ohio St. 498; *Reeves vs. Treasurer Wood Co.*, 8 Ohio St. 345.

* * * The use must be for the public at large. *Memphis Freight Co. vs. Mayor*, 4 Cold. 419. The use that will justify the taking of private property by the power of eminent domain, is the use by or for the government, the general public or some portion of it; and *not* the use by or for particular individuals, or for the benefit of certain estates. The use may be limited to the inhabitants of a small locality, but the benefit must be in common and not to a very few persons or estates.

The prosperity of each individual conduces, in a certain sense, to the public welfare, but this fact

is not a sufficient reason for taking other private property to increase the prosperity of individual man.

The draining of marshes and ponds may be for the promotion of the public health and so become a public object; but the draining of farms to render them more productive, is not such an object.

The other errors complained of refer to the question whether or not the proposed ditch would be a public benefit or only a private benefit."

19 *Ohio Jurisprudence* 2d, at page 430:

"Private property can be taken only for a public use. The legislature has no power to authorize the taking of the property of one individual, without his consent for the private use of another, even on the payment of full compensation."

19 *Ohio Jurisprudence* 2d, at page 435:

"Many authorities, in determining what is a public use, regard as one of the controlling considerations the right of the public to use or have service from the improvement for which land is to be appropriated, as a matter of right, and not as a mere favor. It has been said that the public use of anything is the employment or application of the thing by the public, and that public use means the same as use by the public."

Decisions relied upon by the defendants are concerned with the phrase contained in Article I, Section 19 of the Ohio Constitution that the "private property shall ever be * * * subservient to the public welfare * * *." They completely ignore the definite wordage of the Fifth Amendment of the United States Constitution that makes mandatory the taking shall be for public use as distinguished from public welfare. We quote:

"* * * nor shall *private property* be taken for *public use* without just compensation."

From the foregoing, the Court should have granted the prayer of the plaintiff's petition because the use to which plaintiff's property is to be put is not primarily public. The action taken was clearly erroneous.

The city ordinance and resolution must fail because of the absolute failure to give any prior notice whatsoever before the area was determined to be slum or blighted; and that it is not predominately residential.

A municipality just can not go ahead and find that a whole area is slum or bligh. .d and all the owners therein *must* give up their properties without prior notice to the property owners. This is a fundamental right.

Attention is again called to the fact that while the defendants wanted to contend that the notice from the City Planning Commission (Defendants' Exhibit "D") could also be considered notice from the City Council, this is absolutely erroneous, as the City Planning Commission and the City Council are two separate and distinct bodies —each separately established by the City Charter and each having separate and distinct duties.

Chapter 5 of the City Charter (fully contained in the record) establishes the City Council and provides that "the legislative powers of the City * * * shall be vested in a council; each member of which shall be elected from a separate ward."

Chapter 11 of the City Charter is captioned "The Executive" and provides:

Section 67:

"The executive and administrative powers of the city shall be vested in the mayor, directors of departments and other *administrative offices provided for in this chapter* or by ordinance."

This Chapter (Chapter 11) provides for a city planning commission:

"§ 76: *There shall be a city planning commission composed of seven members.*"

The City Planning Commission is part of the Executive—not Legislative—branch of the government.

Under no stretch of the imagination can it be contended that a so-called notice of a proceeding before an executive branch of the government can be considered as the notice required to be given by the legislative branch before one of its actions can become legal.

Where the defendants contend that notice of an executive proceeding should be considered as notice of a legislative proceeding, they are obviously conceding the necessity for the legislative notice, admitting its failure to have been given, and that this failure voids the legislation. However, no notice was ever given by the City Planning Commission prior to its determination that the area was slum or blighted.

We again quote from the notice:

"The Cleveland City Planning Commission has heretofore determined the above described areas to be both blighted or deteriorated and deteriorating within the definition of Section 1.1502 of the codified ordinances of the City of Cleveland."

Is a property owner afforded her "due process rights" when she is not given notice affording adequate time for an opportunity to defend her rights at a fair and impartial hearing, and where a City Planning Commission advises her, in substance, that it has already made the requisite findings to enable appropriation of her property? The Commission unveiled a redevelopment plan on November 22, 1960 which embodies 190 acres of downtown Cleveland, contemplated the municipality's appropriation of practically that entire area with the demolition of about 235 structures, including hotels, office buildings, parking

garages, homes and commercial and industrial buildings, the removal of about 43 families, the elimination of 429 separate commercial and industrial businesses, the construction of many new structures therein, the almost entire abandonment of the present general business and commercial areas of downtown Cleveland and, despite protest that there has been insufficient time to fully comprehend the plan let alone investigate its many facets as affecting the property owner and where the City Planning Commission then adopts the plan without any variation whatsoever on November 25, 1960, 1960—3 days later.

While the case of *State, Ex Rel. Hoel, Prosecuting Attorney vs. Brown*, 105 Ohio State 479, is not factually pertinent to the instant one, it contains definitions as to "due process" which are applicable herein.

> "Various definitions have from time to time been announced: ' "Due Process of Law" in each particular case means such an exertion of the powers of government as the settled maxims of the law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs.' (18 Cyc. 1080, and cases cited.)"

At page 487:

> " 'A law, which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial.' "

Here there was no adequate notice, a failure to afford a fair and impartial hearing and the positive infringement on constitutional rights of the plaintiff. The obligations of the defendants and the rights of the plaintiff are discussed in the following cited cases. Minimum protections provided to the plaintiff in these respects have not been com-

plied with and justice can only be done the plaintiff by the granting of the prayer of her petition herein.

State, etc. vs. Fairchild, 224 U. S. 510, was an action by the railroad to stay the enforcement of an order of the Public Utilities Commission of Washington having the effect of taking property of the railroad.

> "Syl. 2: The hearing which must precede an order taking property must not be mere form, but one which gives the owner the right to secure and present material evidence; * * *."

It is well known that the court's task of interpreting the constitution and making it applicable to the needs of present day American life and problems is a formidable one; that it is not an ordinary one of adjudication since it is to affect the thought of a modern America, with complex social and economic structure, and yet there is the thought that it is only the court alone which can make effective those barriers against oppression which the people of this nation in the years gone by have so prudently erected as restraints against themselves in the moments of anxiety and passion.

At page 523, the Court said:

> "The order * * * could not be sustained merely because of the fact the carrier had been given an opportunity to be heard, but was to be tested by considering whether in view of all the facts, the taking was arbitrary and unreasonable or was justified by the public necessities which the carrier could lawfully be compelled to meet."

At page 524:

> "For the guaranty of the Constitution extends to the protection of fundamental rights * * * to the substance of the order as well as to the notice and hearing which precede it.

> So that where the taking is under an administrative regulation, the defendant must not be denied the right to show that as a matter of law the order was so arbitrary, unjust or unreasonable as to amount to a deprivation of property in violation of the 14th Amendment. Chicago & C. R. R. v. Minnesota, 134 U. S. 418; Smyth v. Ames, 169 U. S. 466; Chicago & C. R. R. v. Tompkins, 176 U. S. 167, 173.
>
> * * * for the hearing which must precede the taking of property is not a mere form.
>
> The carrier must have the right to secure and present evidence material to the issue under investigation. It must be given the opportunity by proof and arguments to controvert the claim asserted against it before a tribunal bound not only to listen but to give legal effect to what has been established."

This decision reiterates what are elementary due process requirements before a person's property shall be taken from him. They are:

(A) Notice given in sufficient time prior to a hearing to afford the property owner sufficient time for the preparation and trial of his case.

(B) The hearing which must precede an order laying the foundation for the exercise of the right of eminent domain must not be mere form, but one which gives the owner the right to *secure* and present material evidence.

(C) A finding cannot be sustained merely because a property owner had been given an opportunity to be heard, but it is to be tested by considering whether, in view of all the facts, the taking was arbitrary and unreasonable.

(D) The owner must not be denied the right to show that as a matter of law the order was so arbitrary, unjust and unreasonable as to amount to the deprivation of property in violation of the 14th Amendment.

(E) A property owner should be afforded the time for and benefit of *compulsory* process to secure and present evidence in her behalf; to cross-examine witnesses; to present evidence on every material matter.

The unrefuted testimony in the instant case was that the so-called hearing of November 22, 1960 was "a hippodrome." There were insufficient copies of the plan available; the persons present were not advised that they had the opportunity to subpeona witnesses and present testimony or else such right was actually not afforded the persons attending the hearing and requests for postponement were ignored. Is this "due process"?

The plan was automatically adopted as proposed, three days later. The meeting consisted of a mere unveiling and disclosing of that which had been decided was to be done with the private property in this area.

We wish to call to the attention of the Court that only three (3) days elapsed from the unveiling of this huge project until its approval by the City Planning Commission. No notice was given by the City Council of its contemplated action. *The enactment by the City Council was as an emergency under the suspension of the rules* and plaintiff's constitutional rights were completely disregarded.

In this case, admittedly no prior notice was given to the property owners. Can it be that the foundation can be laid for the taking of plaintiff's property without any notice whatsoever?

Ohio Revised Code Section 725.01 contains a definition of blighted areas. This provides as follows:

"(A) 'Blighted area' means an area within the corporate limits of a city in which a majority of the *structures* is detrimental to the public health, safety

or welfare by reason of age, dilapidation, overcrowding, faulty arrangement, lack of ventilation or sanitary facilities, or any combination of these factors, and which is detrimental to the public health, safety or welfare because the majority of such structures fails to conform in one or more of the respects to the ordinances comprising the building code or the ordinances relating to safety, health or sanitation in such city."

Revised Code Section 725.03 (e) provides as follows:

"*The legislative authority, prior to its determination* that an area is a blighted area, prior to the adoption of a development plan, and prior to the finding by it with respect to displaced families as provided in division (d) of this section, *shall hold not less than two public hearings thereon*, at which hearings an opportunity shall be provided for all persons interested to be heard either in person or by counsel. Notice of the time and place of such hearings shall be published in a newspaper of general circulation in the city and the area affected, once each week for two consecutive weeks, and such publication shall be completed not less than thirty days prior to the date set for the first of such hearings. *Notice of the first of such hearings shall be mailed, at least twenty-five days before the first hearing*, to the last known owner of each parcel of land in such area at his last known address as shown by the records of the county auditor. Such notice shall contain a description of the proposed development area by its location in relation to highways, streets, streams or otherwise. Such notice shall state that maps, plats and particular description of the development plan, together with such zoning maps and ordinances as relate thereto, are available for public inspection at a place designated in the notice. The failure of any owner to receive a copy of such notice shall not invalidate the proceedings of the legislative authority."

The defendants admit that this statute was not complied with. *The failure to comply with it will obviously invalidate the proceedings as applicable to this plaintiff.* Defendants contend that the Home Rule Provision of the Ohio Constitution eliminates the necessity for complying with Revised Code Section 725.04. Such is not the law.

They submit no valid reasons why no notice whatsoever should not be given to the property owner before taking such valuable rights away from her. Chapter 725 and all ordinances pertaining to slum clearance etc. were based upon an exercise of the police powers.

A municipality may not enact police, sanitary and similar regulations in conflict with the general rules. Article XVIII, Section 3:

> "Municipalities shall have authority to exercise all powers of self-government and to adopt and enforce, within their limitation, such local police, sanitary and other similar regulations, as are not in conflict with general laws."

Chapter 725 is certainly a police, sanitary and other similar regulation.

The ordinance, that is, No. 2428-60 (Appendix "G") upon which the defendant relies contains the following recital that is proof of its being a police, sanitary and other similar regulation:

> "Whereas, this ordinance constitutes an emergency measure required for the immediate preservation of public property, health and safety because of the existence of slum and blighted areas and conditions of deterioration menacing the public health and safety of Citizens of Cleveland; Now Therefore:"

The provisions of Revised Code Section 725.03, not having been complied with, the ordinance in question is void.

2. THE FEDERAL QUESTION.

The Federal Questions sought to be reviewed were raised in this case in the first instance, in the petition filed in the Common Pleas Court, it being alleged as follows:

> "Plaintiff avers that, having consideration for the scope of the proposed project and its effect upon her property and that of all other owners in said area, in addition to being contrary to the statutes of Ohio, that the short time allowed to plaintiff of the notice of the meeting was unreasonable and arbitrary and the purported adoption of said plans and ordinance constituted the arbitrary taking of property of plaintiff without due process of law and is in violation of the Ohio and United States Constitutions.
>
> * * * * *
>
> Plaintiff incorporates herein by reference all of the averments and allegations of her First Cause of Action, Second Cause of Action, Third Cause of Action and Fourth Cause of Action and further avers that the said attempted appropriation and/or purchase of her said premises and of all other premises in said area does not constitute a taking of private property for a public use and is contrary to the Ohio and United States Constitutions."

The fact of the repugnancy of the proceedings complained about, to the provisions of the said Northwest Ordinance, were set out in the appellant's original brief filed in the Supreme Court of Ohio (pages 6 and 7). The opinion of the Court of Appeals (Appendix "A") makes reference to the claims of the appellant that she was not afforded due process of law and upholds the action of the trial court in not sustaining such claims.

This action includes the applicability of U. S. C. § 1460. (c). (Appendix H.)

3. THE FEDERAL QUESTION IS SUBSTANTIAL.

This Court has decided as recently as 1947 in the case of *Shelly vs. Kraemer*, 334 U. S. 1, 14, that "the action of state courts and of judicial officers, in their official capacities, is to be regarded as action of the state within the meaning of the Fourteenth Amendment." The Court in the *Shelly* case, *supra*, went on to say that "the action of state courts in imposing penalties or depriving parties of other substantive rights without providing adequate notice and opportunity to defend has long been regarded a denial of due process of law guaranteed by the Fourteenth Amendment." The Court continued at page 17 by stating:

> "It has been recognized that the action of state courts in enforcing a substantive common-law rule formulated by those courts, may result in the denial of rights guaranteed by the Fourteenth Amendment, even though the jurisdictional proceedings in such cases may have been in complete accord with the most rigorous conception of procedural due process."

The Court made the following statement in *Lambert vs. California*, 355 U. S. 224, at page 228:

> "Engrained in our concept of due process is the requirement of notice. Notice is sometimes essential so that the citizen has the chance to defend charges. Notice is required before property interests are disturbed, before assessments are made, before penalties are assessed. Notice is required in a myriad of situations where a penalty or forfeiture might be suffered for mere failure to act. Recent cases illustrating the point are Mullane vs. Central Hanover Trust Co., 338 U. S. 306; Covey vs. Town of Somers, 351 U. S. 141; Walker vs. Hutchinson City, 352 U. S. 112. These cases involved only property interests in civil litigation."

The urban renewal project in question herein is related to and is a part of the proceedings of the Housing and Home Finance Agency of the United States of America under authority to make loans and grants of federal funds in billions of dollars to municipalities in the United States. Substantial federal questions are presented herein and call for a decision by the Supreme Court of the United States as to whether any municipal planning commission and/or council may appropriate, with federal money, an area admittedly not predominately residential (contrary to U. S. C. § 1460) and, without any notice to a property owner or any hearing, determine that the area in which the property owner's standard building is located is blighted or deteriorated and that, therefore, a municipality with the financial aid provided by the federal government may, by the exercise of eminent domain, appropriate any citizen's property and then turn it over to a private corporation for profit.

This Federal Law contemplates that some slum residential areas, such as those along railroad tracks, may be renewed into commercial or industrial areas, but does not permit the appropriation of a commercial or industrial area so it can be turned over to private developers for new business purposes.

Both this and other Federal Courts have frequently enunciated the proposition that in order to conform to the rules of due process, a court must afford to the defendant not only due notice but also opportunity to present every available defense.

In the case of *Thompson vs. McDonald* (C. A. 10th, 1938), 95 F. 2d 935, Judge Bratton, in ruling on the efficacy of administrative proceedings of the Commissioner of Insurance of Kansas, said:

"The basic requisites of due process when applied to judicial proceedings are that, having due regard to the form and nature of the proceeding and the character of the rights which may be affected, the order, judgment or decree be entered by a court clothed with jurisdiction of the subject matter and that the party or parties bound by it have notice and be afforded an opportunity to present every available defense."

In the cases of *Lambert vs. California*, 355 U. S. 224, *Mullane vs. Central Hanover Trust Co.*, 338 U. S. 306, *Covey vs. Town of Somers*, 351 U. S. 141 and *Walker vs. Hutchinson City*, 352 U. S. 112, the Court reiterated that the failure to give notice constitutes a deprivation of rights under the Fourteenth Amendment of the United States Constitution. In *Scott vs. McNeal*, 154 U. S. page 34, the Supreme Court expressly holds that whether the notice "required to constitute due process of law is involved, this court must decide for itself whether there has been such notice."

In the case of *Fiske vs. Kansas*, 274 U. S. 385, it was held, at page 385:

"And this Court will review the finding of facts by a State Court where a federal right has been denied as the result of a finding shown by the record to be without evidence to support it; or where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts. Northern Pacific Railway v. North Dakota, 236 U. S. 585, 593; Aetna Life Insurance Co. v. Dunken, 266 U. S. 389, 394 and cases cited."

In the within case, the Court refused to hear evidence as to whether the area in question was or was not a slum or blighted area contending that he could not go beyond

the finding of the City Council to that effect. There, therefore, was no direct evidence in the record to support the action of the Court.

In *Cincinnati vs. Vester*, 281 U. S. 439 and *Sears vs. City of Akron*, 246 U. S. 242, 251, the Supreme Court held that whether the question as to whether the appropriation of private property was for a public use or a private use was a matter for its consideration.

CONCLUSION.

This appeal presents a situation where fundamental —constitutional—rights of the plaintiff have been or will be violated unless the relief is granted. It demands protection by this Court of her inalienable right to acquire and possess property (Section 1, Article I of the Ohio Constitution); that her property shall not be taken from her where the public exigencies do not make it necessary for the common preservation (Article 11, Ordinance of 1787), and the intended taking is not primarily for the public use or the public welfare (Section 19, Article I of the Ohio Constitution, Fourth Amendment, Fifth Amendment and Fourteenth Amendment of the United States Constitution); that her due process rights (Fourteenth Amendment of the United States Constitution; Article I, Section 16 of the Ohio Constitution) to be notified and heard before her right to possess property is taken from her by a public body which, after due notice, "hears before it condemns," "proceeds on inquiry" and "renders judgment only after trial."

In this case, plaintiff should have been given some notice and the right to be heard before the City Planning Commission determined that the area in question was blighted—thereby laying an alleged foundation for the City of Cleveland to exercise the right of eminent domain.

Also, the Courts should not permit plaintiff's property to be taken from her by the illegal use of U. S. C. § 1460.

It is further elementary that the plaintiff be not deprived of her right to seek redress to the courts (Article I, Section 16 of the Ohio Constitution, Ordinances of 1787), where, although permitted to file her plea in Court, she is prevented from introducing evidence in support of it.

It is, therefore, respectfully submitted that this appellant has properly invoked the appellate jurisdiction of this Court.

Respectfully submitted,

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In the Supreme Court of the United States

No. 353

OCTOBER TERM, 1962.

TERESA GRISANTI, *etc.*,
Plaintiff-Appellant,

vs.

THE CITY OF CLEVELAND, *et al.*,
Defendants-Appellees.

APPEAL FROM THE SUPREME COURT OF OHIO AND FROM THE COURT OF APPEALS OF CUYAHOGA COUNTY, OHIO.

APPENDIX TO JURISDICTIONAL STATEMENT.

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APPENDIX A.

Opinion of the Court of Common Pleas of Cuyahoga County, Ohio.

(December 8, 1961.)

DONALD F. LYBARGER, *J.*

This action has to do with the urban renewal project in downtown Cleveland popularly known as "Erieview." The plaintiff, Teresa Grisanti, individually and as a citizen and taxpayer of Cleveland brings suit against the City of Cleveland, the City Council and the City Planning Commission. Plaintiff prays to restrain the City from expending any public funds for the appropriation of premises she owns, or of any other real property in the area known as "Erieview-I Urban Renewal Project No. Ohio R. 36," (hereafter called Erieview-I Project) in the City of Cleveland. She seeks to restrain the City from continuing to prosecute its application to assess compensation as a result of the alleged appropriation of her property. She asks that any action heretofore taken by the defendants with respect to the attempted appropriation be declared null and void. She prays for judgment for costs and reasonable attorney fees and expenses.

REVIEW OF THE PLEADINGS.

Plaintiff states six causes of action as follows:

FIRST, she says she made demand on the Director of Law of the City to bring this action but he refused to do so. She has resided in the premises in question most of her life and specifically in the year 1960-61. She received notice from this court of an application by the City to assess compensation for her property sought to be appropriated for the rehabilitation of a blighted area, being a part of the Erieview-I Project.

Plaintiff says further that even before it owns her property, and without any dedication to a public use, the City has sought to sell the premises to private individuals for the development of private business.

She says that on November 25, 1960, the City Planning Commission purportedly adopted a plan for the Erieview-I Project and that the City Council approved it on December 12, 1960. She says the plan "practically provided for the abandonment of the general business and commercial area of downtown Cleveland * * *"; cut off direct means of access to the area included in the plan; and the defendants arbitrarily "elected to exercise a right which they do not possess to decide and designate what private buildings and businesses will be permitted to remain in said area and which shall be removed and demolished."

Plaintiff avers that the Revised Code of Ohio provides that no steps for the adoption of such a plan can be legally taken until the City Council has held not less than two public hearings thereon, after due notice to property owners affected. She says that no notice was given pursuant to this law, but that the only notice she had was one mailed November 11, 1960, from the City Planning Commission of a hearing to be held November 22, 1960, which notice she promptly protested.

In view of all that has just been recited plaintiff says that the short time of the notice was "unreasonable and arbitrary," and the purported adoption of said plan and ordinance constituted an arbitrary taking of her property without due process and "in violation of the Ohio and United States Constitutions."

SECOND, plaintiff says that hers is "an improved standard, commercial and residential structure;" that taking it along with other property is an invalid exercise of eminent domain since her continued ownership and use of her own

property "is not detrimental to the public safety or welfare," and that any finding of defendants to the contrary is arbitrary and an abuse of the powers of defendants.

THIRD, plaintiff contends that the City's action is an invalid and unconstitutional attempt to exercise eminent domain by "conduiting" (as plaintiff says) her private property to other private persons to be used for private business.

FOURTH, plaintiff avers that the Erieview area "is not an area blighted, deteriorated or detrimental to the public health, safety or welfare," and any such finding by the defendants is arbitrary, contrary to fact and an abuse of the powers of defendants.

FIFTH, she states that an attempted appropriation of her property and all other premises in the area is not "a taking of private property for a public use and is contrary to the Ohio and United States Constitutions," therefore the appropriation constitutes an illegal expenditure of public funds, and unless it is enjoined the City will suffer irreparable damage, for which there is no adequate remedy at law.

SIXTH, plaintiff says that the attempted appropriation of her property while other parcels in the area are not being taken is an unconstitutional exercise and abuse of defendants' powers.

The three defendants have filed their joint answer to plaintiff's petition and in it have made the following admissions: The identity of the defendants is as alleged; the plaintiff is owner of the real estate described by her, and is and was at all times mentioned a taxpayer of the City; demand was made on the Director of Law to bring this action but he failed and refused to do so; the plaintiff owned and resided in the premises in 1960-61 and for

many years; plaintiff received notice of the appropriation suit from this Court, and such action seeks to assess compensation by the City to plaintiff for her property for use in connection with renewal of a blighted area as part of the Erieview-I Project.

The defendants admit that the city advertised for proposals and bids to develop parcels in Erieview, already acquired or to be acquired, for utilization pursuant to the Erieview-I Project Plan, and that plaintiff's premises are included in the site with respect to which proposals and bids were sought. The defendants say that a bid was accepted, and unless restrained, the City will sell such land after its acquisition for use in accordance with the plan and pursuant to City ordinance.

The defendants further admit that on November 25, 1960, the City Planning Commission declared the Erieview area (including plaintiff's property) "to be a blighted, deteriorated and deteriorating area," and adopted a general neighborhood renewal plan, called "Erieview General Neighborhood Renewal Plan, Ohio R-31," and a plan for the specific renewal of a portion of such area, as heretofore mentioned and spoken of by the Court as the Erieview-I Project. The defendants further admit that on December 12, 1960, the City Council approved said plans, and on February 20, 1961, authorized a contract with the United States for aid in the completion of the project.

Defendants deny that their plans call for abandonment of the present general business and commercial area of downtown Cleveland, or the cutting off of access from portions of the city south of Euclid Avenue to the new Erieview area, but say that the plan will revitalize business, commercial and residential uses in what is now a deteriorating neighborhood

They admit that the plan, and actions taken pursuant to it, designate the general character and location of activities and structures to be permitted in the area, and that certain buildings and businesses will be allowed to remain while others will be demolished all in accordance with the plan. They say these designations and activities are in the public interest, health, safety and welfare.

The defendants admit that they did not follow provisions of the Revised Code of Ohio in adopting plans for Erieview, but aver that they acted pursuant to Chapter 51 of the Political Code, Part I of the Codified Ordinances of the City (which was adopted by the City under its home-rule powers). They deny that the Revised Code of Ohio is applicable.

As to notice the defendants admit that plaintiff was given notice on November 11, 1960, of a hearing to be held by the City Planning Commission on November 22, 1960, on the Erieview proposals. They state further that in addition notice was published on November 8 and 15, 1960, in the Cleveland Press and November 9 and 16 in the City Record. They deny that the shortness of the time of notice or any other aspect thereof was ever protested by the plaintiff, and they affirm that such notices were reasonable and in keeping with the City Ordinance.

As a second defense to plaintiff's first cause of action the defendants say that on November 22, 1960, the City Planning Commission, pursuant to the notices mentioned above, held a hearing on the proposed Erieview plans and afforded an opportunity to all interested persons to be heard; but "neither plaintiff or anyone representing plaintiff made any objection at said hearing."

Defendants allege the plans aforesaid were adopted by the City Planning Commission and the City Council

"all to the knowledge of plaintiff." Thereafter the City put the Erieview-I Project into effect, for which purpose the City borrowed Twenty-Two Million Dollars, expended more than Three Million Dollars for real estate and other requirements, took bids for the sale of land in the project, made a contract with the United States Government requiring it to proceed "and irrevocably committed itself to going forward with the same, all to the knowledge of plaintiff."

Defendants aver that if plaintiff had any right to complain of the character and extent of notice given her of the hearing on the Erieview-I Project she slept on her rights, "failed timely to make effective objection," and is estopped now to raise any question relative to notice.

As to plaintiff's second, third, fourth, fifth and sixth causes of action the defendants in each instance plead the same way: as first defense they deny plaintiff's allegations, and as second defense they affirm that plaintiff failed to pursue the remedy given her by the public hearing on the Erieview plans and "if she ever had any right to complain of the appropriation of her property she has lost the same by standing by while defendants irrevocably committed themselves to the Erieview project."

In her reply to defendants' answer plaintiff denies every material allegation except such as admit facts averred by plaintiff.

STATEMENT OF FACTS.

The facts established at the trial or by the admissions made in the pleadings may be summarized as follows:

For some time prior to and during 1960 the City Planning Commission had under consideration a general plan for the development of the downtown area of the City of Cleveland. This came to fruition in November, 1960.

Pursuant to the provisions of Chapter 51 of the Political Code, Part I of the Codified Ordinances of Cleveland, and specifically of Section 1.5104 (Joint Exhibit A), the City Planning Commission on November 11, 1960, gave notice to all owners of property in the Erieview Renewal Project (Defendant's Exhibit D) of a public hearing on November 22, 1960, to consider adoption of an urban renewal plan for Erieview-I Project (Defendants' Exhibit C-2, covering 96 acres embracing land lying in general between the Cleveland Memorial Shoreway and Chester Avenue, from E. 6th Street to E. 14th Street) and a general neighborhood renewal plan (Defendants' Exhibit C-1, embracing 163 acres including Project I in the downtown area).

The plaintiff received such notice and was represented by her son, an attorney, at the public hearing on November 22, 1960, and at an adjourned continuation of the hearing on November 25, 1960. Due to the large number of persons present he could not be heard personally in protest.

The City Planning Commission on November 25, 1960, adopted the plan for Erieview-I Project, made a finding of facts determining the area to be blighted (Defendants' Exhibit B-2), submitted the same to the City Council in keeping with Section 1.5105 (Joint Exhibit A) and recommended adoption of the plan.

The source material for the determination made by the City Planning Commission as to the nature of the area, in its report to Council, is embraced in fourteen binders (Plaintiff's Exhibits 11-25). No tabulation of all of the data in the binders was made available at the trial.

On December 8, 1960, the plaintiff submitted to the Council and City Planning Commission a written protest (Plaintiff's Exhibit 10) to both the procedure followed and the conclusions reached in the findings of facts above men-

tioned. Plaintiff was represented by her son at a Council committee meeting when the proposal came on for hearing.

On December 12, 1960, the City Council duly approved the General Neighborhood Renewal Plan for Erieview, (Defendants' Exhibit C-1) and Erieview-I Project (Defendants' Exhibit C-2). In the ordinance the Council found "the existence of slum and blighted areas and conditions of deterioration menacing the public health and safety of the citizens of Cleveland." (Defendants' Exhibit C.)

On February 20, 1961, the Council adopted Ordinance 449-61 approving and authorizing the execution of a Loan and Capital Grant Contract with the United States Government to aid in financing Erieview-I Project (Defendants' Exhibit B). Therein Council again referred to the "report based upon surveys, site inspection and analyses made by the City Planning Commission" (Defendants' Exhibit B-2) and made a finding that the Erieview-I project area is "a blighted, deteriorated, and deteriorating area detrimental to and a menace to the public safety, health, morals, and general welfare * * *."

Acting upon the authority thus conferred, the Mayor, in the name of the city, on March 3, 1961, entered into a contract with the United States of America whereby the federal government committed itself to lend to the city for Erieview-I Project the sum of $33,875,784, and to make a capital grant of $9,898,784, and relocation payments of $805,000. (Defendants' Exhibit B-1.)

August 3, 1961, the city invited bids on the redevelopment of a number of parcels in Erieview-I Project (Plaintiff's Exhibit 7) and made available to bidders a detailed prospectus of information (Plaintiff's Exhibit 6). Thereafter a bid was received from Erieview Corporation (a private corporation for profit), the bid was accepted,

and a project agreement was entered into November 9, 1961. (Plaintiff's Exhibit 5). The parcel of land thus sold embraced the premises of the plaintiff, with the provision that the city would deliver title "upon the acquisition thereof." Meanwhile, on September 27, 1961, the city had brought an action in this court to appropriate plaintiff's property.

Reference to Plaintiff's Exhibit 3 conveys an accurate understanding of existing uses of land in Erieview, while Plaintiff's Exhibit 4 presents the plan of the uses to which the same land will be put under urban renewal. Plaintiff's Exhibits 8 and 9 indicate that most of the area is presently zoned as "semi-industrial." It is apparent that the new plan for Erieview will relocate some streets and abandon others, but access from Euclid Avenue or streets south thereof is not eliminated, there being adequate means of approach to Erieview provided in the plan.

The evidence establishes that Erieview is broad in scope and will work a complete transformation of a large area in downtown Cleveland. It will permit the private erection of many large new business, commercial and residential structures. It will beautify an area which in general has grown old and neglected. Yet to accomplish these objectives it must take some properties, notably the plaintiff's which are not deteriorating or in bad condition. It is true also that the private property taken will in many instances, as in the plaintiff's case, be sold eventually to private purchasers to be devoted to private, not public, ends. City funds, as well as federal government money, are being used to bring this about. There is no relationship between the price to be paid for the land acquired and the price for which it will sell to new owners, and it may bring less than it cost.

When the City Planning Commission inspected homes in the area in order to prepare its report, and found building code violations, it did not notify the owners and demand correction of substandard conditions. In all some fifty families and 298 out of 429 businesses will be displaced to make way for the Erieview development.

THE ISSUES.

The issues confronting the Court may be summarized as follows:

(1) Is the plaintiff estopped by laches from bringing this action at this time?

(2) In adopting the Erieview Plan and Erieview-I Project was the City bound by the provisions of Ohio Revised Code Chapter 725, or as a home-rule City could it follow a permissive ordinance adopted by City Council?

(3) At any time during the proceeding by which the City adopted the plan for Erieview and created Erieview-I Project (a) was due process violated, or (b) was there an abuse of discretion?

(4) Was the public welfare served by the City in creating the Erieview plan and in setting up the Erieview-I Project? In other words, was the taking for a public use or purpose? Incidental to his issue are these questions: (a) Having determined that an area is blighted and deteriorating, is the City justified in taking property embraced therein which is not of itself sub-standard or deteriorated? (b) Can the City, having duly decided that a public purpose will be served, proceed to condemn and appropriate private property and then sell the same to private enterprise for private development in keeping with a governmental plan?

CONCLUSIONS OF LAW

This is an action by a property owner who feels that her constitutional rights have been infringed by the action of a powerful arm of government, the City of Cleveland, in attempting to take private property not for a public purpose but for the benefit of other private individuals.

The Court is well aware of its duty to protect the rights of the individual against any unlawful encroachment by government if the facts and the law so warrant. The Court must not be carried away by the immensity of the plans envisioned by government, or the ultimate desirability of the objectives sought to be attained, if in fact they do violence to the rights of the small property owner who is in the path of a proposed public improvement.

At the same time the Court has a clear duty to determine what the facts are and then apply the law impartially, no matter what conclusion is reached.

THE QUESTION OF LACHES

At the outset the Court is confronted by the question of laches. City Council adopted the ordinance creating the Erieview-I Project on December 12, 1960. Prior to such action the plaintiff had protested. On February 20, 1961, the Council took steps to obtain and thereafter did get a commitment from the federal government for a loan and grant of large sums of money to make possible the purchase of land and construction of new buildings in Erieview. In due course the City began acquiring properties, and obtaining bids and making contracts for the erection of new structures in keeping with the renewal plan. During all this activity, which was open and notorious, the plaintiff sat back and did nothing from the time

of her protest until the filing of this suit November 8, 1961. Defendants contend that plaintiff's long delay in bringing action, coupled with the fact of the changed position in which the City now finds itself in respect to Erieview, estops the plaintiff by reason of laches from maintaining suit at this time.

"Laches is such neglect or omission to assert a right as, taken in conjunction with lapse of time and other circumstances, causes prejudice to the adverse party, and therefore operates as a bar in a court of equity. * * * The doctrine of laches proceeds upon the question of the iniquity of permitting a claim to be enforced, which iniquity is founded upon some change in the condition or relations of the property or the parties interested." *Kemper v. Apollo B. & L. Co.*, 11 O. C. C. NS 372 at 373 (1908), affirmed 80 O. S. 732 (1909).

The law is stated thus in 20 *O. Jur.* 2nd "Equity," Sec. 86 pg. 181:

> "The delay, knowledge, and acquiescence of the plaintiff, unless under circumstances giving rise to a presumption of abandonment, or the like, are not alone sufficient to constitute laches, without prejudice to another. Such prejudice may consist of the intervention of the rights of innocent third persons; or it may result from a change of position on the part of the defendant himself, such as the expenditure of money in reliance upon his supposed right or the plaintiff's inaction, at least where the defendant, though technically a wrongdoer, is acting in good faith."

See also *Harris v. The Wallace Manufacturing Co.*, 84 O. S. 104 (1911), at pgs. 108-9:

> "Although it has been said that the personal laches of a taxpayer will not defeat a suit brought by him in a representative capacity, since a suit brought to

vindicate the right of all taxpayers of the district should not be dismissed because of an infirmity in the position of the particular taxpayer who assumes to represent the public interest, the courts have repeatedly held or assumed that the right to relief may be lost by laches or estoppel." 39 *O. Jur.* "Taxpayers' Actions," Sec. 13 Pgs. 23-4.

However, the Court has in mind the well established rule in Ohio, set forth in syllabus 3 of *Emery v. City of Toledo*, 121 O. S. 257 (1929), as follows:

"An owner whose property is being appropriated by a municipality may, at any time before the issue of value is determined, invoke the aid of a court of equity to determine whether the use is a public one, or whether the municipality in its legislative proceedings has complied with reasonable strictness with the statutes whereby the power to appropriate is conferred, or whether the municipality is acting in good faith or abusing its power."

Therefore the Court does not feel constrained summarily to dispose of the case on the ground of laches. The parties deserve an answer to the serious constitutional questions here raised. Until the same are dealt with on their merits both the plaintiff's rights and the status of Erieview will remain in doubt.

AS A HOME-RULE MUNICIPALITY THE CITY WAS NOT BOUND BY THE GENERAL LAWS OF OHIO RELATIVE TO URBAN RENEWAL.

The Court is concerned with the question of whether, as plaintiff contends, the City in adopting the Erieview General Neighborhood Renewal Plan and Erieview-I Project was required to proceed under the provisions of Revised Code Chapter 725 (which incidentally was repealed April 24, 1961), or, as defendants contend, under

Chapter 51 of the Political Code, Part I of the Codified Ordinances of the City. Stated otherwise the question is whether a home-rule city may, under its charter, exercise powers relating to urban renewal without reliance on statutory requirements.

The Constitution of Ohio provides in Article XVIII:

> Sec. 3. "Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."
>
> Sec. 7. "Any municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of Section 3 of this article, exercise thereunder all powers of local self-government."

As the Supreme Court said in *Froelich v. City of Cleveland*, 99 O. S. 376 (1919) at p. 380: "by the adoption of charters cities were authorized to secure immunity from general laws." So the home-rule cities are sovereign within their limits and may enact and enforce measures needed to assure their welfare without resort to state legislation. See: *Fitzgerald v. City of Cleveland*, 88 O. S. 338 (1913); *Reutener v. City of Cleveland*, 107 O. S. 117 (1923); *State ex rel. Leach v. Redick*, 168 O. S. 543 (1959).

The courts have made it clear that a multitude of municipal powers may be exercised without statutory authority and even in violation of such authority where the legislature has no power to restrict the home-rule cities. See *State ex rel. Canada v. Phillips*, 168 O. S. 191 (1958).

It is patent that the City of Cleveland, having long since adopted a charter, (Defendants' Exhibit E), is a home-rule City and as such is possessed of "authority to

exercise all powers of local self-government" under Article XVIII. Among these powers is that of eminent domain, which it may use freely, since it is a power derived from the constitutional provision quoted. An interesting case in point is that of *Simmons v. Cleveland Heights*, 81 O. L. A. 129, 160 N. E. 2nd 677 (1959), decided by Judge Danaceau of this court in 1959, wherein it is held that since a municipality gets the power of eminent domain from the first clause of Section 3, Article XVIII of the Constitution of Ohio the legislature cannot place any limitation on the exercise of such power by a home-rule city.

Sustaining this conclusion is the decision of the Supreme Court of Ohio in *State ex rel. Bruestle v. Rich*, 159 O. S. 13 (1953). Syllabus 9 says:

> "No provision of the Constitution of Ohio authorizes the interference by general laws with the exercise of the power of eminent domain, to the extent that such power is granted to municipalities by Sections 3 and 10 of Article XVIII of that Constitution."

The Court is convinced that the City of Cleveland had full authority under the Constitution of Ohio to deal with the subject of urban renewal within its limits without reference to any general legislation in the Revised Code of Ohio. The Court holds therefore that the City was not bound by the provisions of Revised Code Section 725.03 or any part of that Chapter.

The evidence establishes that "the legislative powers of the City, except as reserved to the people by (the) charter, shall be vested in a council * * *" (*Charter, Section* 24) By ordinances duly adopted and known as Chapter 51, Political Code Part I, Sections 1.5102 to 1.5112 of the Codified Ordinances of the City of Cleveland, the City Council has set up the procedures to be followed in

matters concerning urban renewal projects. The City therefore in establishing the Erieview Plan and Project was bound to follow the provisions of said sections.

IN THE ADOPTION OF ERIEVIEW DID THE CITY FOLLOW DUE PROCESS?

In the sections of the Codified Ordinances mentioned are found detailed standards by which the City may determine whether an area is "blighted, deteriorated or deteriorating." Section 1.5103 authorizes preparation of an Urban Renewal Plan, conforming "to the general plan of Cleveland as adopted in 1949," assuring elimination of substandard conditions both in structures and street layout and preventing their recurrence.

Section 1.5104 provides how the City Planning Commission may adopt an Urban Renewal Plan. It calls for a public hearing in advance of adoption, with notice published at least fourteen days, and mailed to all property owners affected not less than ten days, before the hearing. Section 1.5105 then says that after approval the plan shall be submitted to City Council for its consideration and adoption.

The evidence indicates that the City complied with each of these steps. The City Planning Commission held a hearing and plaintiff was represented by her son, an attorney. The latter had the right to protest at that meeting even though there was a large number of persons present. The hearing was continued for three days, and plaintiff had a chance again to protest before the Commission acted.

The Court is of the opinion that the City Planning Commission, when acting under authority of the procedural ordinance for urban redevelopment, is a fact-finding and planning agency of City Council. Its prime

function then is to prepare data and suggest plans for the benefit of council to the end that that body may draft and adopt whatever legislation it deems appropriate under the existing circumstances. Without action by council all of the Commission's plans for urban renewal would be meaningless. The hearing before the City Planning Commission therefore was part of the legislative process.

Going a step further it must be noted that the Commission submitted to City Council not only a detailed plan for Erieview-I Project but also a full report on "the location, physical condition of structures, land uses, environmental influences, and social and economic conditions in the Erieview-I Project area."

With this plan and report before it City Council proceeded to consider an ordinance embodying the plan and project. A committee of council held a hearing on the same and the plaintiff's son attended and filed a written protest. The ordinance was adopted December 12, 1960. The finding in the ordinance was that the area in question "is a blighted, deteriorated and deteriorating area of the City of Cleveland within the purview of Section 1.5102 * * *."

Nine weeks later council in authorizing the acceptance of a loan and grant from the federal government specifically referred to the report mentioned above and made a finding that the "area is not only a blighted, deteriorated and deteriorating area but is also a slum area detrimental to and a menace to the public safety, health, morals, and general welfare * * *."

The plaintiff contends that by the foregoing proceedings of the City she was not afforded adequate prior notice and that she is being deprived of her property without due process. With this conclusion the Court cannot agree.

Due process of law has never been precisely defined.

Bouvier's Law Dictionary perhaps comes as close as possible to the meaning which may have significance in the instant case:

> "Any legal proceeding enforced by public authority, whether sanctioned by age or custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice." 110 U. S., 516.

The Court is convinced that the notice provided in Section 1.5104 was adequate and reasonable. The legislative procedure of council followed the requirements laid down by Section 1.5102 et seq. The Court finds no denial of due process by reason of the action taken by the City Council in adopting Erieview.

DID CITY COUNCIL ABUSE ITS DISCRETION?

The plaintiff contends that in adopting Erieview, Council abused its discretion by acting arbitrarily and in disregard of the facts as to conditions prevailing in the area. She does not claim that there was any fraud or bad faith in the action taken.

The meaning of "abuse of discretion" was defined by Judge Middleton in *State ex rel. Shafer v. Ohio Turnpike Commission*, 159 O. S. 581 (1953) at page 590:

> "Abuse of discretion by the commission is not specifically charged, but the charge of acting 'arbitrarily'; and 'without the exercise of discretion' means 'abuse of discretion' if anything. Reference to a few of the many available decisions will suffice to demonstrate the general understanding of abuse of discretion.
>
> " 'The exercise of an honest judgment, however erroneous it may seem to be, is not an *abuse of discretion*. Abuse of discretion, and especially gross and palpable abuse of discretion, which are the terms or-

> dinarily employed to justify an interference with the exercise of discretionary power, implies not merely error of judgment, but perversity of will, passion, prejudice, partiality, or moral delinquence.' *People v. N. Y. C. Rd. Co.*, 29 N. Y., 418, 431, quoted from in *Alliance v. Joyce*, 49 Ohio St., 7, 22, 30 N. E. 270 by Dickman, J."

Clearly, if there were evidence of a discretion exercised for ulterior purposes, or by reason of bias or favoritism, or due to bribery or without any basis of fact, then the Court would be justified in interfering with the legislative act and setting it aside. But in the absence of fraud, bad faith or abuse of discretion as defined, the court will not inquire into legislative motives. Where it appears that the legislative body had before it facts on which it based its action, the court will not review those facts to determine their relative weight or merits. A city council is the sole judge of the propriety and the necessity of ordinances adopted by it.

On this subject, the court in the case of *Sparks v. Village*, 10 O. N. P. (N. S.) 138 at 139 (1910), said:

> "If the court should undertake to measure the judgment of the council in respect to the necessity of an improvement by its own judgment, the effect would be to transfer from the council, where the Legislature has reposed it, to the court and jury the whole matter of determining what improvements are necessary."

In the case of *Railroad Company v. City of Defiance*, 52 O. S. 262 (1895), the plaintiff sought to enjoin a municipal improvement on the ground that the ordinance authorizing it was unreasonable, unlawful and not in the public interest, but for the private benefit of adjacent property owners. The Supreme Court sustained the lower court in refusing to enjoin, saying in syllabus 8:

"The comparative dangers in the use of grade and overhead crossings, and the relative public benefits and private disadvantages that may result from a contemplated improvement of the streets are matters for the consideration of the members of the council, who are the sole judges of the propriety, as well as of the necessity of the improvement; and their decision, when not transcending their powers, nor induced by fraud, is not subject to judicial revision."

One of the strongest statements on the question of judicial review of governmental actions by legislative bodies is found in *State ex rel. Kittel v. Bigelow*, 138 O. S. 497 (1941), at page 502:

"It is not within the judicial province to nullify a statute or ordinance merely because of the alleged impropriety or mistaken beliefs underlying the legislators' reasons for enacting it."

In the instant case, it is clear that City Council had before it facts on which to base its judgment in enacting the Erieview legislation. The Court under the law as cited could not permit the plaintiff to offer her judgment of the basic facts surrounding the Erieview area and the merits of the proposal in lieu of that of the members of council. There has been no evidence of abuse of discretion. Therefore, the Court must say that council's action in adopting Erieview was the exercise of an honest judgment in good faith and not totally without reason.

WAS THE PUBLIC WELFARE SUBSERVED BY THE TAKING OF PRIVATE PROPERTY TO CREATE ERIEVIEW?

The able briefs of the plaintiff and the amicus curiae strongly contend that the condemnation of plaintiff's property should be enjoined because the *primary purpose* of Erieview is not to eliminate a blighted area but to enable

the erection of new privately-owned structures for private purposes. This the defendants deny. The court is, therefore, confronted squarely by the judicial question of whether or not the taking of land to create Erieview is subservient to the public welfare; that is, whether it is for a public purpose and use. If it is not, then plaintiff must be granted the relief prayed for.

The Bill of Rights of the Constitution of Ohio says in Article I, Section 19:

> "Private property shall ever be held inviolate but subservient to the public welfare."

As noted before, Article XVIII, Section 3 of the Constitution has long been interpreted as conferring on home-rule cities the right of eminent domain. In providing for an "appropriation in excess of public use," Section 10 of the same Article says in part:

> "A municipality appropriating or otherwise acquiring property for public use may in furtherance of such public use appropriate * * *."

The Courts of Ohio have long equated a taking of property for the "public welfare" with a taking for "public use." See *McQuillen v. Hatton*, 42 O. S. 202 (1884); *State ex rel. Bruestle v. Rich*, 159 O. S. 13 (1953).

As to what constitutes a public use, 19 *O. Jur.* 2d "Eminent Domain," Section 23, page 434 says:

> "The view has been taken by the Supreme Court that private property may be taken whenever such taking is required by the public safety, public health, public interest, or public convenience, and the Supreme Court has also taken the view that, under Section 19 of Article I of the Constitution, property taken for 'the public welfare' is regarded as property 'taken for public use.' Beyond this, however, no exact definition of the term 'public use' has been agreed upon by

the authorities, and of course there is difficulty in formulating an accurate definition that would be comprehensive and satisfactory. The character of the work for which the property is taken, and not the means or agencies employed for its construction, determine the question of power in the exercise of this right. In other words, the inquiry must be, 'What are the objects to be accomplished,' not 'Who are the instruments for attaining them?' "

What does the evidence show are the objects to be accomplished by Erieview? First, the plan contemplates the elimination of a portion of Cleveland's downtown area which City Council has found to contain a preponderance (1) of structures, detrimental to the public health, safety or welfare, and (2) of defective or inadequate street layout, or faulty lot layout, or conditions which endanger life or property by fire or other causes. The council further declared that these "condition cannot be eliminated except by a complete clearance and redevelopment of the area in accordance with the plan * * *." Second, Erieview establishes a plan for the renewal of the area which will not be circumscribed by existing streets and little alleys, but will permit spacious use of the land to bring to downtown Cleveland not only new business structures but also dwelling accommodations for many people.

The Court is convinced that in this age the public welfare demands a safe and healthy city in every area, and that in addition the well-being of all of its citizens is enhanced by having a beautiful city.

In *State ex rel. Bruestle v. Rich, supra,* the Supreme Court says in the first syllabus:

"Where an urban redevelopment project contemplates the acquisition of property located in a slum area, the elimination of slum conditions in the area by clearing therefrom the buildings and making the land available

for redevelopment and the subsequent sale of the land for redevelopment with restrictions as to its use which will insure against recurrence of slum conditions, and where such project apparently has as its primary purpose the elimination of slum conditions and provisions against their recurrence, such project may involve a public use or purpose for which public funds can be expended and the power of eminent domain exercised."

A land mark decision bearing on urban redevelopment is that of the Supreme Court of the United States in the case of *Berman v. Parker*, 348 U. S. 26 (1954). On page 33, the court says:

"We do not sit to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive. See *Day-Brite Lighting, Inc. v. Missouri*, 342 U. S. 421, 424. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide that the Nation's Capitol should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way."

But the plaintiff raises two potent objections which the Court must not overlook. She says, first, that her property is not substandard or deteriorated and that the City has no reason to condemn it. It is true that the City did not specifically declare plaintiff's property to be blighted; it did, however, find her land to be in a blighted area, and that in order to eliminate the prevailing condi-

tions of the area it was necessary to resort not to "spot" condemnation but to a taking of most of the property in the area, regardless of the condition of any specific piece of property. Could the city legally do this?

In *State ex rel. Bruestle v. Rich* the court had to deal with an objection similar to this. On page 33 Judge Taft said:

> "It does not follow that the area is not a slum area or that the acquisition of the buildings and vacant land referred to [which were not substandard] is not necessary to clear a slum area and prevent a recurrence of the slum conditions in that area."

In *Wilson v. City of Long Branch*, 142 At. 2nd, 837, a New Jersey case (1958), the court says on page 856:

> "It is understandable that individual property owners, who believe their homes to be in good condition and fully adapted to purposes of residence, find it difficult to accept a determination of blight * * *. However, the process contemplated by the law cannot be accomplished by means of individual selection of property. It must proceed in terms of redevelopment of areas. Such improvements will inevitably envelop some property or properties, which standing alone, cannot be so described. When this occurs, the individual must bow to the public welfare and accept just compensation for his deprivation."

The best pronouncement on the objection raised by plaintiff herein, and which in the opinion of the Court disposes of it, is found in *Berman v. Parker, Supra*. On pages 34 to 36 the court says in part:

> "In the present case, Congress and its authorized agencies attack the problem of the blighted parts of the community on an area rather than a structure-by-structure basis. That, too, is opposed by appellants. They maintain that since their building does not imperil health or safety nor contribute to the making of

a slum or a blighted area, it cannot be swept into a redevelopment plan by the mere dictum of the Planning Commission or the Commissioners * * * The experts concluded that if the community were to be healthy, if it were not to revert again to a blighted or slum area, as though possessed of a congenital disease, the area must be planned as a whole. It was not enough, they believed, to remove existing buildings that were insanitary or unsightly. It was important to redesign the whole area so as to eliminate the conditions that cause slums * * * It was believed that the piecemeal approach, the removal of individual structures that were offensive, would be only a palliative * * *"

"* * * Property may of course be taken for this redevelopment which, standing by itself, is innocuous and unoffending * * * If owner after owner were permitted to resist these redevelopment programs on the ground that his particular property was not being used against the public interest, integrated plans for redevelopment would suffer greatly. The argument pressed on us is, indeed, a plea to substitute the landowner's standard of public need for the standard prescribed by Congress. But as we have already stated, community redevelopment programs need not, by force of the Constitution, be on a piece-meal basis—lot by lot, building by building."

Finally plaintiff contends that her land is being appropriated under the device of urban renewal to be sold "to a private developer for private gain," and that this is the primary purpose of the City's action.

With this contention the Court cannot agree. As indicated above, the Court is convinced that the first purpose of the City is to eliminate blight conditions and make it impossible for them to recur. Yet it is true that land in Erieview has been and will be sold to private individuals who will hereafter erect private buildings and perhaps

realize a profit therefrom. Is this in accord with the public welfare?

Again *State ex rel. Bruestle v. Rich* provides an answer. Syllabus 4 bears upon the point and says:

> "If the primary purpose for the exercise of the power of eminent domain is to acquire the property for the public welfare within the meaning of Section 19 of Article I of the Ohio Constitution, the power may be exercised even where there may be an incidental non-public use of the property or benefit from its taking."

Berman v. Parker also speaks with authority on this subject saying on pages 33-34:

> "Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine. Here one of the means chosen is the use of private enterprise for redevelopment of the area. Appellants argue that this makes the project a taking from one businessman for the benefit of another businessman. But the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established. See *Luxton v. North River Bridge Co., Supra*; cf. *Highland v. Russell Car Co.*, 279 U. S. 253. The public end may be as well or better served through an agency of private enterprise than through a department of government—or so the Congress might conclude. We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects."

The plaintiff in her brief attempts to distinguish the cases of *State ex rel. Bruestle v. Rich* and *Berman v. Parker* on the ground that they were concerned with "actual elimination of slums" and with "providing low cost housing," whereas such is not true in the instant case. The Court cannot reach this conclusion. The principles laid down in those decisions apply here with equal vigor. The

City is under no obligation to put low cost housing in the area, and if the primary purpose of the condemnation is valid (as the Court has found) then council may determine how best to redevelop Erieview.

The Court refers to the case of *Housing, Etc., Authority v. Minneapolis Metropolitan Co.*, 104 N. W. 2nd 864 (1960), wherein the Supreme Court of Minnesota says at page 870:

> "Because of the location and character of the area and its adaptability to commercial and light industrial purposes, it is understandable that the Authority made no provision for renewal housing within the area. We find nothing, either from an examination of the statutes or the authorities which discuss the subject of renewal uses, that a redevelopment plan must necessarily provide for housing."

The Court does not believe it is relevant to the issues here under consideration that the City has contracted to convey plaintiff's premises, along with additional land, to a developer before it has acquired title.

The land lying in the westerly portion of Erieview was embraced in the first plan for the proposed town of Cleveland, drawn by Spafford, the surveyor, in 1796. By the time of Merchant's Map of 1835 the streets and alleys between East 9th and East 17th Streets were essentially the same as they are now. The engineers of the past did a good job of planning for a little city then of small consequence. But is a large part of the downtown area of the great metropolis of Cleveland to lie moribund in the cocoon which was woven for it when a village more than a century ago?

The City Council in the lawful exercise of its legislative function has determined that the area in question is blighted and deteriorating, and that the public welfare demands its renewal. It has taken steps to acquire the

land for a public purpose and has adopted a reasonable and lawful plan for its future use and development. The City's action to appropriate plaintiff's property now pending in this Court, is properly brought. For these reasons the Court denies plaintiff's prayer for injunctive relief and grants judgment for the defendants.

APPENDIX B.

Journal Entry of the Court of Common Pleas of Cuyahoga County, Ohio.

THIS CAUSE came on for hearing on the 27th day of November, 1961 before the Honorable Donald F. Lybarger upon the pleadings, evidence and arguments and briefs of counsel, and upon consideration, the Court finds the issues joined, except as to laches, for the defendants, and,

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that plaintiff's prayer for injunctive relief herein be and it is hereby denied, and that judgment herein is granted for the defendants who shall recover their costs, for which judgment is hereby rendered.

APPENDIX C.

Opinion of the Court of Appeals of Cuyahoga County, Ohio.

HURD, J.

This cause is here appealed on questions of law from a judgment of the Court of Common Pleas wherein the court denied an injunction sought by the plaintiff against the City of Cleveland, the City Council, and the City Planning Commission from expending any public funds for appropriation of property owned by plaintiff or any other property owners in the area known as "Erieview-I Urban Renewal Project No. Ohio R-36" (hereinafter sometimes referred to as Erieview).

The plaintiff is the owner of a commercial and residential structure located at 1205 St. Clair Avenue within the area which comprises Erieview. An appropriation action was commenced in the Court of Common Pleas by the City under its power of eminent domain which is presently a pending action. This action for injunction was brought to enjoin the City from proceeding with the appropriation proceeding, although concurrently therewith, plaintiff seeks as a taxpayer to enjoin the expenditure of any public funds for any of the purposes of the Erieview Project.

The City of Cleveland (hereinafter referred to as the City) is a Charter City and acting under authority of its Home Rule powers and pursuant to its ordinances, through the City Planning Commission, gave notice on November 11, 1960 to all property owners within the Erieview Renewal Project area of a public hearing to be held on November 22, 1960. The record shows that the public hearing was called for the purpose of considering the adoption of an urban renewal plan for Erieview-I Project and a general neighborhood renewal plan. The area hereinafter

referred to as Erieview comprises approximately 96 acres of land, the major portion of which is zoned as semi-industrial, and lies between Cleveland Memorial Shoreway and Chester Avenue from East Sixth Street to East Fourteenth Street.

The plaintiff, as the owner of the property within this Erieview area, was duly notified in writing of the public hearing and was represented at two such hearings by her son who is an attorney.

Subsequently, on November 25, 1960, the City Planning Commission adopted the plan for Erieview and determined that the area in question was blighted and in accordance with the city ordinances, submitted the same to the City Council with its recommendation that Council adopt the plan.

Over the plaintiff's written protest, the City Council, on December 8, 1960, approved the General Neighborhood Renewal Plan for Erieview and Erieview-I Project and also found "the existence of slum and blighted areas and conditions of deterioration menacing the public health and safety of the citizens of Cleveland." Moreover, the City Council adopted an ordinance approving and authorizing the execution of a Loan and Capital Grant Contract with the United States Government to aid in the financing of Erieview, and pursuant thereto, the City of Cleveland entered into a contract with the United States Government for this purpose. The Federal Government agreed to loan to the City the sum of $33,875,784.00 and to make a capital grant of $9,898,784.00 and relocation payments of $805,000.00.

On September 27, 1961, the City commenced the aforesaid action now pending in the Court of Common Pleas to appropriate the property of plaintiff acting pursuant to its power of eminent domain.

The City proceeded to invite bids for the redevelopment of numerous parcels of land within Erieview, including the parcel owned by the plaintiff, and subsequently accepted a bid offered by Erieview Corporation (a corporation for profit) and entered into a project agreement with it on November 9, 1961, in which the City agreed to deliver title to the Corporation "upon the acquisition thereof, and which agreement contained the condition that a forty story building be erected by said Corporation on a parcel of land of which plaintiff's property is a part. Inasmuch as Federal money is to be used, the whole plan is to conform to standards imposed by the United States Government.

This summary of facts is a condensation of the evidence as set forth in the bill of exceptions, the admissions in the pleadings, the numerous exhibits, and the principal documentary evidence, which in capsule form, is as follows:

1) Joint Exhibit A—being the Procedural Ordinance for Urban Redevelopment—passed June 24, 1959.

2) Defendant Exhibit A—"The Urban Renewal Plan" the general Erieview Project No. 1—plan submitted November 22, 1960.

3) Defendant's Exhibit B-1 "Ordinance No. 449-61"—loan and capital grant contract between City of Cleveland and the United States of America—which is an ordinance authorizing the Federal Loan and Grant Contract; accepting factual report of Erieview conditions and determining Erieview to be a slum area. Passed February 20, 1961.

4) Defendant's Exhibit B-2—"Report to Council" by Director of Urban Renewals: Factual report to Council on Erieview conditions. Received February 13, 1961.

5) Defendant's Exhibit C—Ordinance No. 2428-60—Ordinance approving Erieview Project No. I and General Neighborhood Renewal Plan; finding plans properly adopted and in conformity with all requirements and finding entire Erieview area to be blighted, deteriorated and deteriorating. Adopted December 12, 1960.

6) Plaintiff's Exhibit 10—Letter of Protest by the Plaintiff.

The assignments of error are three in number, with certain subheadings, as follows:

"1) The trial court erroneously rejected evidence proffered by the plaintiff in support of her averments that:

(a) The area in question is not an area blighted, deteriorated or deteriorating, nor detrimental to the public health, safety or welfare and any such finding or determination by the defendants was arbitrary, capricious, contrary to law, and constituted an abuse of discretion and of the powers of the defendants.

(b) That the threatened taking of plaintiff's property by the exercise of eminent domain was for a private and not for a public use.

"2) The Court erred in failing to enter judgment in favor of the plaintiff and against the defendants since this action established that:

(a) The attempted appropriation of plaintiff's property is not for a public use.

(b) Plaintiff is being deprived of her property without due process of law. The constitutional requirements of due notice before adoption of the so-called plan and ordinances which constitute the alleged legal foundation for the City of Cleveland's attempted exercise of the right of eminent domain as to plaintiff's property was not given. No notice

whatsoever was given by either the City Planning Commission or the City Council prior to determining that the said area was blighted or deteriorated or deteriorating so that property owners, including the plaintiff, would have an opportunity to be heard in connection therewith.

(c) The legislative authority, that is, the defendant, City Council, did not hold at least two public hearings prior to the adoption and approval of such plan with notice thereof mailed at least twenty-five days before the first hearing to the last known address of the owner of each parcel of land in said area.

(d) That her real property consists of an improved, standard, commercial and residential structure and her ownership, use and maintenance of it is not detrimental to the public health, safety or welfare.

"3) Finding of the trial court is contrary to and against the manifest weight of the evidence."

Considering assignment of error No. 1-a, it is the contention of the plaintiff in support of her averments that the trial court erred in rejecting the testimony proffered by the plaintiff to the effect that the area in question is not an area blighted, deteriorated and deteriorating or detrimental to the public health, safety or welfare and that any such finding or determination by the defendants was arbitrary, contrary to law and constituted an abuse of discretion by the trial court.

Relative to this claim, we think it should be noted that a distinction must be made between the class of cases which involve solely the police power of the municipality and the class of cases involving what is commonly referred to as a governmental purpose in the public interest.

The instant case is one for a public purpose in the

nature of self-improvement under the City's plan of Urban Renewal.

This is well illustrated by a comparison of two cases decided by the Supreme Court. As pointed out by the defendants, paragraph 6 of the syllabus in *Benjamin vs. City of Columbus*, 167 Ohio St., 103, 146 N. E. 2d 854, states the rule for police power cases:

> "Whether an exercise of the police power does bear a real and substantial relation to the public health, safety, morals or general welfare of the public and whether it is unreasonable or arbitrary are questions which are committed in the first instance to the judgment and discretion of the legislative body, and, unless the decisions of such legislative body on those questions appear to be clearly erroneous, the courts will not invalidate them."

Contrasted with this is a limitation on judicial inquiry in public improvement cases as exemplified by paragraph 8 of the syllabus in *Railroad Company v. Defiance*, 52 Ohio St. 262, 40 N. E. 89, which was an action to enjoin a road improvement that would compel the plaintiff to move or remove its bridges:

> "The comparative dangers in the use of grade and overhead crossings, and the relative public benefits and private disadvantages that may result from a contemplated improvement of the streets are matters for the consideration of the members of the council, who are the sole judges of the propriety, as well as of the necessity of the improvement; and their decision, when not transcending their powers, nor induced by fraud, is not subject to judicial revision."

Attention is also called to the case of *State, ex rel. Kittel v. Bigelow*, 138 Ohio St. 497, 37 N. E. 2d 41, which states the limit on judicial review of a city council's determination of the number of signatures on a petition as follows:

"The determination by the legislative authority of a municipality that there are sufficient signatures on a petition to require submission of a proposed charter amendment to the electorate is conclusive in the absence of fraud or a gross abuse of discretion."

Thus it is clear that there is a real difference between a court's examination of a legislative determination to see if it is "clearly erroneous" as in police power cases, and the substitution of its judgment for that of the legislative body on a showing of fraud or gross abuse of discretion when passing upon the validity of legislative action to carry on public improvements in the interest of public welfare.

An important case is *Berman v. Parker*, 348 U. S. 26, decided by the Supreme Court of the United States in 1954, which rejected the request of the owners of a non-blighted department store to review all of the legislative determinations upon which the development plan was based. The Court held:

"Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch."

Likewise in *Kaskel v. Impellitteri*, 306 N. Y. 73, 115 N. E. 2d 659, the court ruled that there was no basis for it to reject the legislative determination, holding the fact question not to be justiciable. At page 80, the court said:

"Therefore, the question here is not whether certain public officials have acted arbitrarily or unwisely in coming to a certain conclusion. Here we have a naked question of legality, that is, of power, and the particular power to make a determination on this matter of judgment has been conferred by statute on these defendants. Four different public bodies have,

after adequate investigation and consideration which appears in the record, determined that this area may properly be considered substandard and insanitary. * * *"

"* * *

"The situation here actually displayed is one of those as to which the Legislature has authorized the city officials, including elected officials, to make a determination, and so the making thereof is simply an act of government, that is, an exercise of governmental power, legislative in fundamental character, which, whether wise or unwise, cannot be overhauled by the courts. If there were to be a trial here and the courts below should decide in favor of plaintiff, there would be effected a transfer of power from the appropriate public officials to the courts."

Thus, we conclude that the City, acting through the Planning Commission and the City Council, was acting in its exercise of governmental power for a public purpose by reason of which the court is not permitted to substitute its judgment for the judgment of the legislative body of the City.

In considering this question, it should be observed that the trial court did not exclude evidence relating to the basis upon which the City Council acted or to any evidence, documentary or otherwise, presented to or before City Council, nor was any evidence excluded concerning the Erieview Corporation, the company which has contracted to build the forty story building which is to rest, in part, on plaintiff's land and no evidence was rejected concerning the purposes of Erieview.

The extensive evidence here shows that the legislative body of the City had before it a great mass of factual data upon which to make its legislative judgment that the area in question is, in fact, a blighted area, deteriorated and deteriorating, and, as a consequence, detrimental to the pub-

lic health, safety and welfare. Thus, we conclude from all the documentary evidence above described and all other evidence contained in the record that the findings of the trial court must be sustained.

It is clear, upon an examination of the documentary evidence, that Section 1-5105 of The Cleveland Procedural Ordinance, which is Joint Exhibit A, entitled "Approval of Plan" requires that an ordinance be adopted approving an Urban Renewal Plan which shall include a finding and determination that the area in question is, in fact, blighted, deteriorated and deteriorating. The Cleveland City Council, by Ordinance No. 2428-60, passed December 12, 1960, adopted the Erieview Plan and made the legislative finding that the area included in Erieview "is a blighted, deteriorated and deteriorating area of the City of Cleveland" within the purview of Section 1-5102 of the Codified Ordinances of the City of Cleveland. Furthermore, in accepting "The Loan and Capital Grant Contract" with the Federal Government to carry out the Erieview Project-I, the City Council once again made an express finding to the same effect. Thus it appears from this and other evidence that the City complied with all procedural requirements in accordance with its laws and ordinances in adopting the Urban Renewal Plan for Project-I and the General Neighborhood Renewal Plan. Such was the finding of the trial court which we must sustain on the basis of competent evidence disclosed in the record and the rule of law defining legislative power when used for a public or governmental purpose.

On this basis, it would be clearly incompetent to admit testimony of individuals interested, expert or otherwise, to testify contrary to the findings and judgment of the City Planning and Legislative Bodies which considered and adopted the plan. This is especially true since

the evidence shows that ample opportunity was afforded to all property owners to be heard in opposition to the findings of Council. The notice to property owners in the area, in part, contained the following:

> "The Cleveland City Planning Commission has heretofore determined the above-described areas to be both blighted or deteriorated and deteriorating areas within the definition of Section 1.5102 of the Codified Ordinances of the City of Cleveland.
>
> "The purpose of this hearing is to consider the proposals of the Urban Renewal Plan, and to afford to all persons or organizations present thereat an opportunity to be heard, prior to the adoption of said plan by the City Planning Commission, and its referral to the Council of the City of Cleveland for approval as provided for in Sections 1.5104 and 1.5105 of the Codified Ordinances of the City of Cleveland.
>
> "*Documents comprising the proposed Urban Renewal Plan for Project No. 1 and the General Neighborhood Renewal Plan are available for public inspection at 520 City Hall, Cleveland, Ohio.*" (Emphasis added.)

The trial court found that the notice of which the above quoted section is a part was adequate and reasonable as provided in Section 1.5104 of the Ordinances of the City, a finding of fact which, upon examination of the procedural ordinances of the City, including Section 1.5104, we sustain.

Having determined that the judicial branch of the government may not substitute its judgment for the legislative branch unless it is clearly shown that the legislative branch has exceeded its constitutional powers or has acted fraudulently or in bad faith, or has abused its discretion, we are obliged to sustain the trial court in rejecting the evidence proffered by the plaintiff. There is no claim here of fraud or bad faith. There is, however, the claim of an

abuse of discretion upon the part of the City Planning Commission and the City Council. Upon consideration of the record, the exhibits, and all other evidence, we are of the opinion that the trial judge did not err in finding that there was not an abuse of discretion upon the part of the City Council, acting in its legislative capacity for a public purpose, or upon the part of the Planning Commission, it being understood that the Planning Commission was acting in an official capacity as a fact-finding body for the City Council. For the reason stated, assignment of error 1-a is overruled.

We come now to a consideration of assignments of error 1-b and 2-a, both of which involve substantially the same claim, namely that the attempted appropriation of plaintiff's property is for a private and not for a public use. The contention here made is the same as was made in the case of *State, ex rel. Bruestle v. Rich*, 159 O. S. 13, 110 N. E. 2d 788. Syllabus 1 of that case reads:

> "1. Where an urban redevelopment project contemplates the acquisition of property located in a slum area, the elimination of slum conditions in the area by clearing therefrom the buildings and making the land available for redevelopment and the subsequent sale of the land for redevelopment with restrictions as to its use which will insure against recurrence of slum conditions, and where such project apparently has as its primary purpose the elimination of slum conditions and provisions against their recurrence, such project may involve a public use or purpose for which public funds can be expended and the power of eminent domain exercised."

The evidence here shows that Federal money is to be used and the purpose of the plan is to prevent the recurrence of blighted conditions and the plan conforms to standards imposed by the United States Government.

Referring again to the *Bruestle* case, syllabus 4 reads:

"4. If the primary purpose for the exercise of the power of eminent domain is to acquire the property for the public welfare within the meaning of Section 19 of Article I of the Ohio Constitution, the power may be exercised even where there may be an incidental nonpublic use of the property or benefit from its taking."

Judge Taft, speaking for the court in the *Bruestle* case, made the following significant statement at page 22:

"An examination of those ordinances and of that contract clearly discloses that the redevelopment of this area contemplates the acquisition by the city, either by purchase or through the exercise of the right of eminent domain, of the property located in the area, the elimination of slum conditions in the area by clearing therefrom the buildings and making the land available for redevelopment, and the subsequent sale of the land for redevelopment with restrictions as to its use which will insure against recurrence of any slum or other conditions of blight; and discloses that the primary purpose of the redevelopment of this area is to eliminate the slum conditions and other conditions of blight and provide against their recurrence."

Judge Taft further stated:

"The validity of urban redevelopment projects similar to the project involved in the instant case has been uniformly sustained by the courts of last resort in other states." (Citing authoritative cases from Alabama, Arkansas, Illinois, Michigan, New York, Pennsylvania, Rhode Island and Tennessee.)

In headnote 2 of *Schenck v. Pittsburgh*, 364 Pa. 31, it is stated:

"2. Where the right of eminent domain is vested in a municipality, an administrative body, or even a

private corporation, the question as to whether the circumstances justify the exercise of the power in a given instance is not a judicial one, at least in the absence of fraud or palpable bad faith."

In *Zurn v. City of Chicago*, 389 Ill. 114, headnote 2, is found the following:

"2. Constitutional Law—Neighborhood Redevelopment Corporation Law of 1943 is not invalid as authorizing taking private property for other than public use. As the legislature has determined that the elimination of conditions conducive to ill-health, transmission of disease, infant mortality, juvenile delinquency, crime and poverty as enumerated in section 2 of the Neighborhood Redevelopment Corporation Law of 1943 is in the interest of health, morals, safety and general welfare of the citizens of the State, the Supreme Court cannot say that the legislative finding that the elimination and redevelopment of slum and blight areas is a public purpose is unwarranted, and such use constitutes a public use regardless of the use to be made of the property after the redevelopment has been achieved."

Also, in the *Opinion of the Justices*, No. 119, 254 Ala. 343, headnote 2, there is the following:

"2. The statute authorizing taking of land in slum area by housing authority through exercise of power of eminent domain and disposal of such land at its use value in accordance with plan for redevelopment by private enterprises or by public agencies authorizes a taking for a 'public use' permitted by the constitution, in view of the public benefit resulting from slum clearance and redevelopment."

A pertinent declaration is also made in *Berman v. Parker*, 348 U. S. 26, a case cited by the trial court at pages 33 and 34:

"* * * Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine. Here one of the means chosen is the use of private enterprise for redevelopment of the area. Appellants argue that this makes the project a taking from one businessman for the benefit of another businessman. But the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established. See *Luxton v. North River Bridge Co., supra*; cf. *Highland v. Russell Car Co.*, 279 U. S. 253. The public end may be as well or better served through an agency of private enterprise than through a department of government—or so the Congress might conclude. We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects. * * *"

For the reasons stated, we sustain the conclusions of fact and law found by the trial court and, therefore, overrule assignments of error 1-b and 2-a.

This brings us to a consideration of appellant's assignments of error Nos. 2-b, 2-c and 2-d, which will be considered together. The claims of appellant that she was not accorded due process of law are grounded primarily on her claim that the court did not follow Section 725, et seq., Revised Code, which was repealed April 24, 1961. The contention of the City is that the action here taken was under authority of its home rule powers under Article I8, Section 3 of the Ohio Constitution which provides:

"Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

This grant of power, as contended by the appellee, is self-executing and plenary, except only as limited by

parallel constitutional provisions. We are of the opinion that this grant of power applies to the facts of the instant case, as the City of Cleveland, under its Home Rule Charter, may undertake and carry out all provisions for self-improvement, a proposition which has been upheld by numerous decisions of our Supreme Court.

Referring once again to the *Bruestle* case, *supra*, syllabus 7 reads:

> "'All powers of * * * self government' as set forth in Section 3 of Article XVIII of the Ohio Constitution include the power of eminent domain."

and syllabus 9 reads:

> "No provision of the Constitution of Ohio authorizes the interference by general laws with the exercise of the power of eminent domain, to the extent that such power is granted to municipalities by Sections 3 and 10 of Article XVIII of that Constitution."

See also: *Froelich v. City of Cleveland*, 99 Ohio St. 376, 124 N. E. 212; *State, ex rel. City of Toledo v. Weller*, 101 Ohio St. 123, 128 N. E. 88; *State, ex rel. Gordon v. Rhodes*, 156 Ohio St. 81, 100 N. E. 2d 225; *Angell v. City of Toledo*, 153 Ohio St. 179, 91 N. E. 2d 250; *State, ex rel. McClure v. Hagerman*, 155 Ohio St. 320, 98 N. E. 2d 835; *Babin v. City of Ashland*, 160 Ohio St. 328, 116 N. E. 2d 580; *State, ex rel. Leach v. Redick*, 168 Ohio St. 543, 157 N. E. 2d 106; *State, ex rel. Bindas v. Andrish*, 165 Ohio St. 441, 136 N. E. 2d 43.

We, therefore, overrule assignments of error Nos. 2-b, 2-c and 2-d.

Proceeding to consider assignment of error No. 3, as previously stated, this appeal is on questions of law, therefore, inasmuch as this court does not have the case for trial de novo, we are bound by the findings of fact of the trial judge as shown in his written opinion where sup-

ported by credible evidence in the record. The trial judge had the opportunity of hearing the testimony of the witnesses first hand, was in a position to appraise their interest in the cause, their manner of testifying and their candor while testifying on the witness stand. The trial judge also had before him all of the documentary evidence, including the ordinances of the City of Cleveland, the Urban Renewal Plan, the Loan and Capital Grant Contract between the City of Cleveland and the United States of America, the report to Council by the Director of Urban Renewal and the ordinance approving the Erieview Project-I and General Renewal Plan, as well as other exhibits. Upon an examination of all the evidence, we cannot conclude that the findings of the trial court were contrary to the manifest weight of the evidence, and, therefore, assignment of error No. 3 is overruled.

In this context, we again point to the decision of the Supreme Court of the United States in the case of *Berman v. Parker, supra*, where, at page 33, the court stated:

> "We do not sit to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive. See Day-Brite Lighting Inc. v. Missouri, 342 U. S. 421, 424. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide that the Nation's Capitol should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way."

If we substitute the Council of the City of Cleveland for Congress and the Planning Commission of the City as one of its authorized agencies, and the City of Cleveland for the District of Columbia, the words of the United States Supreme Court have equal application to the facts of the instant case, bearing in mind that the taking of property in such a case is for a public use and is authorized under the provisions of the Home Rule Charter of the City of Cleveland and the Ohio Constitution.

Thus, it appears that the acquisition by the City of all the various properties and the titles thereto is only a means to an end. The objective is the elimination of blighted areas and the subsequent reconveyance of part or all of said land to the redeveloper or redevelopers with exclusive restrictions on the use of the land to prevent recurrence of blight. It is a plan national in scope. The plan is not confined to slum clearance or public housing, although these limited objectives may be part of an entire Urban Renewal program. In this and similar cases, the plaintiff is protected by being adequately compensated for her property, either through direct negotiation with the City or by the finding of a jury in the appropriation proceeding which is now pending in the Court of Common Pleas against the plaintiff's property. The plaintiff, by the action here, indicates her complete disapproval of such procedures on the ground that her individual property cannot be classified as blighted, but the trial court found that her property, although not blighted, was within a blighted area, a finding of fact which we must sustain. This presents a situation wherein the plaintiff's natural wishes to retain her property are subordinated to the good and welfare of the community as a whole. It is the inevitable result of the absolute necessity of the City, acting in good faith, to eliminate and prevent urban blight and

deterioration and to give an opportunity to the City to thrust forward with a comprehensive urban renewal plan for the benefit of the entire community.

There appearing to be no errors prejudicial to the plaintiff on the face of the record, the judgment of the Court of Common Pleas is affirmed.

Exceptions may be noted and a Journal entry drawn in accordance herewith.

KOVACHY, *P. J.*, SKEEL, *J.* concur.

APPENDIX D.

Journal Entry of the Court of Appeals of Cuyahoga County, Ohio.

This cause came on for hearing upon the appeal on questions of law, assignments of error, bill of exceptions, and the original papers and pleadings from the Court of Common Pleas of Cuyahoga County, and the arguments and briefs of Counsel, and upon consideration the Court finds there is no error prejudicial to the appellant.

It is, therefore, ordered that the judgment of the Court of Common Pleas be, and the same is hereby, affirmed and that the appellees recover from the appellant all their costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

Exceptions are allowed to appellant.

Dated March 12, 1962.

APPENDIX E.

Journal Entries of the Supreme Court of Ohio.

May 9, 1962:

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS FOR CUYAHOGA COUNTY TO CERTIFY ITS RECORD.

It is ordered by the Court that this motion is overruled.

May 9, 1962:

This cause, here on appeal as of right from the Court of Appeals for Cuyahoga County was heard in the manner prescribed by law and upon motion of the appellee to dismiss such appeal.

On consideration thereof, such appeal is dismissed for the reason that no debatable constitutional question exists herein.

It is further ordered that the defendants appellees recover from the plaintiff appellant their costs herein expended; that a mandate be sent to the Court of Common Pleas to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Cuyahoga County for entry.

June 13, 1962:

Upon consideration of the application for rehearing, it is ordered by the Court that rehearing is denied.

APPENDIX F.

Ordinance of the City of Cleveland Establishing Erieview Renewal Plan.

Ord. No. 2428-60.

By Mr. Latkovic (by departmental request).

An emergency ordinance approving the plan adopted by the City Planning Commission on November 25, 1960, for the General Neighborhood Renewal Plan for Erieview, Ohio R-31, and for Erieview Project I, Ohio R-36.

Whereas, pursuant to the provisions of Section 1.5104 of the Codified Ordinances of the City of Cleveland, the City Planning Commission on November 25, 1960 has adopted a plan for the renewal of the area more particularly described therein and in this ordinance, which plan is designated "Erieview General Neighborhood Renewal Plan, Ohio R-31"; and

Whereas, on the same date said Commission also adopted a plan for the renewal of Project I thereof, the area more particularly set forth and described therein and in this ordinance, which plan is designated "Erieview Project I, Ohio R-36"; and

Whereas, said plans have been submitted to this Council pursuant to Section 1.5105 of the Codified Ordinances of the City of Cleveland for approval; and

Whereas, this ordinance constitutes an emergency measure required for the immediate preservation of the public property, health and safety because of the existence of slum and blighted areas and conditions of deterioration menacing the public health and safety of the citizens of Cleveland; now, therefore,

Be it ordained by the Council of the City of Cleveland:

SECTION *1.* That the plans designated "Erieview General Neighborhood Renewal Plan, Ohio R-31," and "Erieview Project I, Ohio R-36" submitted for approval of this Council is hereby ordered received as a matter of public record and filed with the Clerk of Council for public inspection and information.

SECTION *2.* That it is hereby found and determined that the area, described in said Erieview General Neighborhood Renewal Plan as follows:

* * * * *

[Description of Property Omitted.]

and indicated on the map attached to said plan and made part thereof, in a blighted, deteriorated and deteriorating area of the City of Cleveland within the purview of Section 1.5102 of The Codified Ordinances of the City of Cleveland.

SECTION *3.* That it is hereby found and determined that said Erieview General Neighborhood Renewal Plan, Ohio R-31 and Erieview Project I, Ohio R-36 conform to the General Plan of Cleveland, as adopted in 1949, and as amended; conform to the Downtown General Plan of the City of Cleveland as amended within which the Erieview area lies, and conforms to the workable program of the City of Cleveland for the elimination and prevention of slums and blight.

SECTION *4.* That it is hereby found and determined that said Erieview General Neighborhood Renewal Plan, Ohio R-31 and Erieview Project I, Ohio R-36, will afford the maximum opportunity consistent with the sound needs of the City of Cleveland for the rehabilitation, conservation or development of the Erieview Urban Renewal area

SECTION 5. That it is hereby found and determined that the redevelopment of the Erieview Project I, Ohio R-36 for predominantly nonresidential reuse is necessary for the proper development of the community.

SECTION 6. That it is hereby found and determined as the result of a competent independent analysis of the local supply of transient housing, that there exists in the Erieview Urban Renewal area and the City of Cleveland a need for additional units of such housing.

SECTION 7. That it is hereby found and determined that it is necessary to provide, in the urban renewal plan, for lands to be made available to institutions of higher learning to be used by such educational institutions for redevelopment in accordance with the use or uses specified in the urban renewal plan and the redevelopment of such area in accordance with said urban renewal plans, as provided by Section 112 of the Housing Act of 1949, as amended.

SECTION 8. That it is hereby found and determined that the Erieview General Neighborhood Renewal Plan, Ohio R-31 and Erieview Project I, Ohio R-36, have been adopted in compliance with the provisions of Section 1.5104 of the Codified Ordinances of the City of Cleveland and that said plans are in full conformity with the requirements of Section 1.5103 of the Codified Ordinances of the City of Cleveland.

SECTION 9. That the Erieview General Neighborhood Renewal Plan, Ohio R-31 and Erieview Project I, Ohio R-36, adopted by the City Planning Commission of the City of Cleveland on the 24th day of November, 1960, and submitted to this Council as File No. 2393-60 on the 28th day of November, 1960, be and the same are hereby approved.

SECTION *10*. That the Erieview General Neighborhood Renewal Plan, Ohio R-31, be and is hereby approved in all respects; that it is determined to be adequate as an outline of the urban renewal activities proposed for the area involved, as a framework for the preparation of urban renewal plans, and to indicate generally to the extent feasible in preliminary planning, the land use, population density, building conversion, prospective requirements for rehabilitation and improvement of property, and any portions of the area contemplated for clearance and redevelopment.

SECTION *11*. That it is hereby found and determined that the standards established and the controls set forth in said Erieview Project I, Ohio R-36, are necessary to be maintained and enforced in the public interest, and the same are hereby adopted as fully and completely as if herein set forth as and with the effect of the ordinances of the City of Cleveland.

SECTION *12*. That it is hereby found and determined that the statement of the methods for the temporary relocation of families displaced from Erieview Project I, Ohio R-36, area submitted with the Urban Renewal Plan for said area, presents a feasible plan for such family relocation within the requirements of Section 1.5102 of the Codified Ordinances of the City of Cleveland.

SECTION *13*. That it is hereby found and determined that in order to enable the City of Cleveland to undertake Erieview Project I, Ohio R-36, in accordance with the Urban Renewal Plan for said project area, the City will be required to avail itself of the financial assistance provided by Title I of the Housing Act of 1949, as amended, said Title I imposing certain obligations and responsibilities, and requiring among other things:

(1) The provision of local grants-in-aid;

(2) A feasible method for the relocation of families displaced from the project area;

(3) Other local obligations and responsibilities in connection with the undertaking and carrying out of urban renewal projects;

and that the City of Cleveland is required to make application for a loan under Section 102(a) of said Title I in the amount of $34,657,000 and for a Project Capital Grant to the full amount avilable for the undertaking and financing of the Project, presently estimated at $805,000, which amounts shall be subject to increase or decrease from time to time, depending upon the final costs as determined upon the completion of said project.

The Commissioner of Slum Clearance and Blight Control is hereby authorized and directed to execute and file such application with the Housing and Home Finance Agency and to provide such additional information and to furnish such documents as may be required in behalf of said Agency, and to act as the authorized correspondent of the City of Cleveland.

SECTION *14*. That in the event that a contract with the Federal Government is authorized by Ordinance of Council based upon the application authorized in Section 13 hereof, or supplemental or amendatory applications under said authority of Council of the City of Cleveland, for and on behalf of the City of Cleveland, pledges the cooperation of the City in helping to carry out the Urban Renewal Plan for the Erieview Project I, Ohio R-36 area and to provide the necessary local grants-in-aid required pursuant to said plan.

SECTION *15*. That this ordinance is hereby declared to be an emergency measure and, provided it receives the

affirmative vote of two-thirds of all members elected to Council, it shall take effect and be in force immediately upon its passage and approval by the Mayor; otherwise it shall take effect and be in force from and after the earliest period allowed by law.

Passed December 12, 1960.

Effective December 12, 1960.

APPENDIX G.

"Ordinance of 1787."

Adopted by Congress July 13, 1787 and providing for the government of the territory of the United States northwest of the River Ohio.

"Section 14:

It is hereby ordained and declared, by the authority aforesaid, that the following articles shall be considered as articles of compact between the original States and the people and States in the said territory and forever remain unalterable unless by common consent, to-wit:

ARTICLE II.

The inhabitants of the said territory shall always be entitled to the benefits of the writs of habeas corpus, and of the trial by jury; of a proportionate representation of the people in the Legislature, and of judicial proceedings according to the course of the common law. All persons shall be bailable, unless for capital offences, where the proof shall be evident, or the presumption great. All fines shall be moderate and no cruel or unusual punishments shall be inflicted. No man shall be deprived of his liberty or property, but by the judgment of his peers, or the law

of the land, and should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same. And, in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made or have force in the said territory that shall, in any manner whatever, interfere with or affect private contracts, or engagements, bona fide and without fraud previously formed."

APPENDIX H.

42 U. S. C. § 1460(c) Public Law 86-372, Title IV, § 413, 73 Stat. 675, 677, as Amended Sept. 23, 1959.

Financial assistance shall not be extended under this subchapter with respect to any urban renewal area which is not predominantly residential in character and which, under the urban renewal plan therefor, is not to be redeveloped for predominantly residential uses; Provided, That, if the governing body of the local public agency determines that the redevelopment of such an area for predominantly non-residential uses is necessary for the proper development of the community, the Administrator may extend financial assistance under this subchapter for such a project; Provided further, That the aggregate amount of capital grants contracted to be made pursuant to this subchapter with respect to such projects after September 23, 1959, shall not exceed 20 per centum of the aggregate amount of grants authorized by this subchapter to be contracted for after such date.

Office-Supreme Court, U.S.
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In the Supreme Court of the United States

No. 353.

OCTOBER TERM, 1962.

TERESA GRISANTI,
Plaintiff-Appellant,

vs.

THE CITY OF CLEVELAND, *et al.*,
Defendants-Appellees.

MOTION TO DISMISS APPEAL.

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In the Supreme Court of the United States

No. 353.

OCTOBER TERM, 1962.

TERESA GRISANTI,
Plaintiff-Appellant,

vs.

THE CITY OF CLEVELAND, *et al.*,
Defendants-Appellees.

MOTION TO DISMISS APPEAL.

Pursuant to Rule 16 of this Court, Appellees move to dismiss this appeal on the grounds that two questions of which Appellant seeks review were not raised or passed upon by the state courts and that none of the questions presents a substantial federal question.

OPINIONS BELOW.

The December 8, 1961 opinion of the Court of Common Pleas of Cuyahoga County (set forth as Appellant's Appendix A) is reported in 18 Ohio Op. 2d 143 and 179 N. E. 2d 798. The opinion of the Court of Appeals of Cuyahoga County (set forth as Appellant's Appendix C) is reported in 89 Ohio L. Abs. 1 and 181 N. E. 2d 299. The May 9, 1962 order of the Supreme Court of Ohio dismissing Appellant's appeal for the reason that no debatable constitutional question was involved is reported at 173 O. S. 386 and 182 N. E. 2d 568, and is set forth, with the journal entry denying rehearing on June 13, 1962, as Appellant's Appendix E.

CONSTITUTIONAL PROVISIONS AND ORDINANCES INVOLVED.

The only federal constitutional provision involved is the "due process" portion of the Fourteenth Amendment set forth by Appellant. Appellant does not here elucidate the applicability of the Fourth Amendment, as she did not in the state courts, and so assumedly it is not involved. As is later pointed out, neither the Fifth Amendment nor the Ordinance of 1787 quoted by Appellant are involved.

Also involved are:

a. Sections 1.5102-1.5108 of the Codified Ordinances of Cleveland (the "statute" governing the urban renewal activities of this home-rule city), set forth in full herein as Appendix A. Section 1.5102, so often referred to in the discussion that follows, is here set forth:

> "An area shall be determined to be a blighted or deteriorated area if (1) a preponderance of the structures therein is detrimental to the public health, safety or welfare by reason of age, dilapidation, over-crowding, faulty arrangement, lack of ventilation or sanitary facilities, or any combination of these factors, and which is detrimental to the public health, safety or welfare because a preponderance of structures within said area fails to conform in one or more respects to the provisions of the Codified Ordinances of the City of Cleveland relating to building, housing and sanitation; or (2) there is a predominance of defective or inadequate street layout, or faulty lot layout in relation to size, adequacy, accessibility or usefulness, or unsanitary or unsafe conditions, or deterioration of site improvements, or conditions which endanger life or property by fire or other causes."

b. Ordinance No. 2428-60, adopted by Cleveland City Council on December 12, 1960, finding the area involved to be blighted, deteriorated and deteriorating and adopting the Erieview Plan. This is set forth as Appellant's Appendix F.

c. Section 1 of Ordinance No. 449-61, adopted by Cleveland City Council February 20, 1961, in which certain findings of facts concerning the area here involved are made:

> "That this Council accepts the facts contained in the report of the Director of Urban Renewal and Housing, File No. 415-61, and it is further found and determined that the Erieview I Project (Ohio R-36) area is not only a blighted, deteriorated, and deteriorating area but is also a slum area detrimental to and a menace to the public safety, health, morals, and general welfare most particularly of the thousands of people who live in, work in, own property in, and otherwise use the project area and immediate vicinity, as well as the people of the City of Cleveland because an overwhelming preponderance of the structures in the project area is detrimental to the public health, safety, and welfare by reason of age, dilapidation, overcrowding, faulty arrangement, lack of ventilation or sanitary facilities, mixture of incompatible land uses as is evidenced by the failure of said structures to conform to the provisions of the Codified Ordinances of the City of Cleveland relating to building, housing and sanitation, unsafe conditions, deterioration of site improvements and other conditions which endanger life and property by fire or other causes, all of which conditions cannot be eliminated except by a complete clearance and redevelopment of the area in accordance with the plan therefor approved by this Council by Ordinance No. 2428-60 on December 12, 1960."

The acquisition of Appellant's property is permitted, as found by the Ohio courts, by the portion of Art. I, § 19 of the Ohio Constitution that reads:

> "Private property shall ever be held inviolate, but subservient to the public welfare * * * and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner."

THE QUESTIONS PRESENTED FOR REVIEW.

There is no question here involved of just compensation. The sole questions are:

1. In a landowner's action to enjoin the appropriation of his property, does a trial court's exclusion of evidence proffered in an attempt to contradict the facts found by the city's legislative body upon which it based its determination of the necessity of acquiring the landowner's property, violate any rights of the landowner under the Fourteenth Amendment's due process clause?

2. Is the elimination of a blighted and deteriorated area, as defined in Section 1.5102 of the Cleveland Codified Ordinances (quoted above at page 2), and planned redevelopment of that area so to prevent the recurrence of those conditions, a public purpose?

3. Does due process require that a landowner be afforded notice and an opportunity to be heard on the question of the necessity of the acquisition of his property before the legislative body by ordinance determines such necessity?

STATEMENT OF THE CASE.

Appellant questions the procedure and the substance of the Erieview I Urban Renewal Project in the City of Cleveland, one of the many now familiar urban renewal projects throughout the nation financed and administered jointly by the federal and local governments. She originally presented her objections in the Ohio courts by way of an action to enjoin the acquisition of her property and that of others in the Erieview area. She asserted standing as a taxpayer of the City and as the owner of property the City seeks to acquire for the public purpose of eliminating blighted conditions in an area determined by the legislative body of the City of Cleveland to be slum, blighted, deteriorated and deteriorating.

A. The Urban Renewal Ordinance Involved.

Under the rather unique provisions of the Ohio Constitution, municipalities are granted directly by Art. XVIII, § 3 "all powers of local self-government." A municipality which has adopted a charter, as has the City of Cleveland, is empowered by Art. XVIII, § 7 of the Constitution to determine the procedure for the exercise of the powers of local self-government. Under Section 24 of the Cleveland City Charter the legislative powers of the city are vested in the elected City Council. Thus in matters of local self-government the Cleveland City Council is the legislative body of Ohio. The Supreme Court of Ohio has held that elimination of conditions of blight and deterioration, as here involved, is a matter of local self-government. *State ex rel. Bruestle v. Rich*, 159 Ohio St. 13, 110 N. E. 2d 778 (1953).

Acting under the power granted directly to it by the state constitution via the charter, the Cleveland City

Council enacted on October 17, 1955 the basic urban renewal procedural ordinance, which is presently §§ 1.5102 to 1.5108 of the Codified Ordinances of Cleveland; that complete Ordinance was Joint Exhibit A in the trial court, and is set forth in full herein as Appendix A. In general, it provides for the elimination of slum and blight conditions on an area-wide basis, with planned redevelopment of an area so to prevent the recurrence of those conditions. An area shall be found to be blighted or deteriorated if conditions specified in § 1.5102, quoted above at page 2, are found to exist. When the City Planning Commission determines the existence of a blighted or deteriorated area, it is empowered by § 1.5104 to adopt, after at least one public hearing, a plan for the renewal of the area; that section requires that notice of the public hearing must be given by p. blication at least fourteen days, and mailed notice to owners of property in the proposed redevelopment area at least ten days, before the hearing. Before the plan adopted by the Planning Commission becomes effective it must, under § 1.5105, be approved by the City Council. Council's approval must include a finding and determination by it "that the area is a blighted, deteriorated or deteriorating area," that the plan conforms with the "workable program for the elimination and prevention of slums and blight" and affords the "maximum opportunity consistent with the sound needs of the city as a whole for the * * * redevelopment of the Urban Renewal Area by private enterprise."

B. The Proceedings Taken Under the Ordinance.

Based on the reports of city agents and officials, as well as of special consultants, as to building and area conditions in the Erieview area, the City Planning Commission determined the area to be blighted and deteriorated and set a public hearing for November 22, 1960 on the adoption of the renewal plan. Notice of the hearing was published in a Cleveland newspaper of general circulation on November 8 and 15 and in the official City newspaper on November 9 and 16; in addition, the Appellant as a property owner in the area received the required 10-day mailed notice of the hearing (Appellant's Jurisdictional Statement, page 9). Following the November 22 public hearing at which the Appellant was represented, the Planning Commission, in a November 25 resolution, found that the Erieview area was blighted, deteriorated and deteriorating as defined in Section 1.5102 of the Codified Ordinances, and adopted the Erieview plan. Thereafter, by Ordinance No. 2428-60, adopted December 12, 1960 (set forth as Appellant's Appendix F), the City Council made a determination that the area was blighted, deteriorated and deteriorating within the purview of § 1.5102, and approved both the Erieview General Neighborhood Renewal Plan and the Erieview-I Urban Renewal Plan submitted by the Planning Commission. (Both plans were before the trial court as Defendant-Appellee's Exhibits A and C-1.) Subsequently in Section 1 of Ordinance 449-61, adopted February 20, 1961, approving the Loan and Capital Grant contract with the Federal government (quoted above at page 3, and Defendant-Appellee's Exhibit B in the trial court), Council made certain express findings of the conditions in the Erieview area.

In the execution of the adopted Urban Renewal Plan, the City Council adopted on February 28, 1961 Resolution

No. 246-61 declaring its intention to appropriate Appellant's property. On June 6, 1961, notice of the intent expressed in this resolution was served upon Appellant. On June 26, 1961 Council passed Ordinance No. 1524-61 appropriating the Appellant's property "for the purpose of eliminating slum conditions and deterioration in the area herein concerned" and for redevelopment to insure against the recurrence of those conditions. Thereafter followed negotiations between the Appellant and her sons and the City, during which the City attempted to reach an agreement on reasonable and just compensation for Appellant's property so that an appropriation action would not be necessary. Appellant and her sons would not accept any of the City's offers, and so on September 26, 1961 the City was compelled to file in the Common Pleas Court its application to assess compensation; this proceeding to appropriate Appellant's property was styled *City of Cleveland vs. Teresa Grisanti*, Common Pleas Court of Cuyahoga County No. 758,038. More than a month later, on November 3, 1961 the Appellant filed the present action seeking to enjoin the appropriation of her property and all other property in the area that had been determined by the legislative body of the city to be slum, blighted and deteriorated. Pending disposition of this injunction action, the appropriation proceedings were stayed. Following the Ohio Supreme Court's denial on June 13, 1962 of Appellant's application for rehearing in this case, the jury was empaneled in the appropriation case and on July 3, 1962 found the just compensation for Appellant's property to be $67,500; Appellant's motion for new trial in the appropriation case was denied on August 28, 1962.

C. The Decisions Below.

The trial court in its opinion set forth as Appellant's Appendix A ruled against all of the Appellant's objections to the legislative action here involved. The Court of Appeals affirmed (its opinion is set forth as Appellant's Appendix B). The Ohio Supreme Court dismissed the appeal to it on the grounds that no debatable constitutional questions were presented; only five of the seven judges of that Court signed the dismissal order, but the two judges who did not sign did not express a dissent. On June 13, 1962, the Supreme Court denied Appellant's application for rehearing. These Supreme Court journal entries are set forth as Appellant's Appendix E.

It is here appropriate to correct at least one unfounded allegation in Appellant's Jurisdictional Statement. She asserts at pages 5 and 8 that eighty percent of this ninety-six acre area is "vacant." The source of this figure, much less how Appellant defines "vacant," is unknown to Appellee. This figure does not appear in any of the Exhibits or in the trial court's findings. But even assuming the figure to be relevant, a glance at the "Existing Land Use Map" in the Erieview-I Urban Renewal Plan (Defendant-Appellee's Exhibit A in the trial court) demonstrates its gross incorrectness. For the Court's convenience, to illustrate this point as well as to give the Court an idea of the size and the nature of the blighted area here involved, this map is attached hereto as Appendix C.

Appellant still asserts, although the point was disposed of below by the three Ohio courts, that the City's actions are to be measured by the statutory provisions of Chapter 725 of the Ohio Revised Code and not by the urban renewal procedural ordinance adopted by the City Council (set forth herein as Appendix A). On this question—clearly one of purely state concern for the final and ex-

clusive determination by the state courts—the trial judge held "that the city was not bound by the provisions of Rev. Code Section 725.03 or any part of that chapter" (Appellant's Appendix A, page 15A). And the Court of Appeals overruled the Appellant's contention that the home-rule City of Cleveland was bound by the statute rather than by its own procedural ordinance (Appellant's Appendix C, page 43A). Thus the state courts correctly decided that the legislative power here exercised by the City Council was granted directly to it by the state constitution, with the Council exercising thereunder as the City's legislative body this power of local self-government. It thus could not be controlled by an act of the state legislature.

ARGUMENT.

Appellant's attack is against an urban renewal project typical of the multitude across the country that involve the joint efforts of federal and local governments in eliminating the blighted areas of our cities. This means selected by Congress and local legislatures has been held constitutional by this Court and the courts of thirty states.

All of the objections Appellant raises have previously been passed on, adversely to her position, by this Court, and so none present a substantial federal question. Her objection to the trial court's exclusion of evidence proffered to contradict the findings of the legislative body clearly presents no federal question at all. Two issues she seeks to raise were not raised or passed upon in the Ohio courts and so are not properly before this Court.

A. THE QUESTIONS OF THE APPLICABILITY OF THE ORDINANCE OF 1787, AND OF THE LEGALITY OF THE LOAN AND CAPITAL GRANT CONTRACT, WERE NOT RAISED OR PASSED UPON BY THE COURTS BELOW AND SO NEITHER IS PROPERLY BEFORE THIS COURT UNDER 28 U. S. C. § 1257(2).

1. The Ordinance of 1787.

Appellant's assertion of certain rights under the Ordinance of 1787 (the "Northwest Ordinance") was mentioned for the first and only time in her brief filed in the Supreme Court of Ohio (page 40, Jurisdictional Statement). That matter could not be, and was not, passed upon by that court. Under Ohio practice, on an appeal on questions of law only the reviewing court may not delve into matters not raised in the lower court and which are not a proper matter of record. *Goyert & Vogel v. Eicher*, 70 Ohio St. 30 at 34 (1904); *Goldsmith v. State of Ohio*, 30 Ohio St. 208 (1876). More specifically, a constitutional question (if indeed this be one) not raised in either the trial or appellate court is deemed waived on an appeal to the Ohio Supreme Court. *Village of Clarington v. Althar*, 122 Ohio St. 608 (1930); *City of Grandview Heights v. Redick*, 165 Ohio St. 326 (1956); *State ex rel. King v. Shannon*, 170 Ohio St. 393 (1960).

Even if it had been properly raised, the question has been long since disposed of by the holding of this Court in *City of Cincinnati v. Louisville & Nashville Railroad Co.*, 223 U. S. 390 (1912), affirming 82 Ohio St. 466 (1910), that the Ordinance, and in particular Article II which Appellant seeks to invoke, does not apply to a state after its admission into the Union, and in particular did not limit Ohio's power of eminent domain.

2. The Loan and Capital Grant Contract.

Appellant's Question (6) questions the legality of the City's Loan and Capital Grant contract with the United States. Since this is the first time that Appellant has raised this question in any way. ("This action includes the applicability of U. S. C. § 1460(c)"—Jurisdictional Statement, p. 40), it was neither before nor passed upon by the state courts and so Appellant cannot now urge it on this appeal.

B. THE TRIAL COURT'S EXCLUSION OF EVIDENCE TO CONTRADICT THE FINDINGS OF THE LEGISLATIVE BODY DOES NOT PRESENT A FEDERAL QUESTION.

Appellant asserts that in some way she has been denied due process of law by the Ohio courts in their refusal to admit her evidence aimed at contradicting the findings and conclusions of the legislative body, the City Council (and of the City Planning Commission and the Federal Housing and Home Finance Agency). This is but the usual case of the individual attempting to set his conception of facts and judgment against that of the elected legislative body, and presents no constitutional issues.

There were introduced into evidence, part by the Appellant and part by the Appellees, the various reports and factual summaries upon which the legislative body based its determination of the necessity of acquiring property, including Appellant's, in the Erieview area. The trial court could but conclude as it did (Appellant's Appendix A, p. 20a), that the Council had before it facts upon which to exercise its judgment, that there was no evidence of abuse of discretion, and that the action of that legislative body was "the exercise of an honest judgment in good faith and not totally without reason." The Court of Appeals approved the exclusion of Appellant's evidence, and the findings of the trial court, in these words:

"* * * the trial court did not exclude evidence relating to the basis upon which the City Council acted or to any evidence, documentary or otherwise, presented to or before City Council, * * *

* * * * *

"The extensive evidence here shows that the legislative body of the City had before it a great mass of factual data upon which to make its legislative judgment that the area in question is, in fact, a blighted area, deteriorated and deteriorating, and, as a consequence, detrimental to the public health, safety and welfare.

* * * * *

"Having determined that the judicial branch of the government may not substitute its judgment for the legislative branch unless it is clearly shown that the legislative branch has exceeded its constitutional powers or has acted fraudulently or in bad faith, or has abused its discretion, we are obliged to sustain the trial court in rejecting the evidence proffered by the plaintiff. There is no claim here of fraud or bad faith. There is, however, the claim of an abuse of discretion upon the part of the City Planning Commission and the City Council. Upon consideration of the record, the exhibits, and all other evidence, we are of the opinion that the trial judge did not err in finding that there was not an abuse of discretion upon the part of the City Council, acting in its legislative capacity for a public purpose, or upon the part of the Planning Commission, it being understood that the Planning Commission was acting in an official capacity as a fact-finding body for the City Council." (at 36a to 38a).

The exclusion of the proffered evidence was recognition of the limits on the review power of courts inherent in the constitutional concept of separation of powers and of the clear distinction between the scope of judicial re-

view in this case of determining the public necessity and those police power cases where the court is called upon to review an uncompensated infringement on individual rights. This is in accord with the settled law of Ohio (*State ex rel. Waltz v. Michell*, 124 Ohio St. 161 (1931); *Village of South Euclid v. Bilkey*, 126 Ohio St. 505 (1933); *State ex rel. Kittel v. Bigelow*, 138 Ohio St. 497 (1941)), and of this Court (*Wabash Railroad Co. v. Defiancé*, 167 U. S. 88 (1897)).

In the *Wabash Railroad* case, *supra*, this Court at an early date approved the salutory exclusionary rule applied by the Ohio courts in our case. In the state supreme court (*Railroad Company v. Defiance*, 52 Ohio St. 262, 40 N. E. 89 (1895)), the railroad objected to the trial court's exclusion of expert opinions on the dangers involved in a street improvement and of evidence of the discussions of council while considering the improvement ordinance. The Ohio court held that the company was not prejudiced by the exclusion, since the trial court could not consider such evidence anyway:

> "The final action of the council in the adoption of the ordinances, gave them their validity and the vote on their adoption was the exercise, by the members of that body, of their deliberate judgment, after all the consideration they had given the subject. *Of the necessity or expediency of the improvements thereby directed to be made, they were the sole judges, and in the absence of fraud, their determination upon those questions cannot be judicially revised.*" (At 318; emphasis added.)

This Court affirmed, 167 U. S. 88 (1897), expressing its approval of the exclusion:

> "* * * we are not at liberty to inquire whether the discretion vested in the common council of determining this question was wisely exercised; or what

> the motives were for making the change; or whether the crossing so improved was burdensome to the railroad company; or made unsafe to persons crossing the tracks. These were considerations which might properly be urged upon the common council as arguments against the proposed change; but it is beyond the province of the courts either to praise the wisdom or criticize the unwisdom of such action." (at page 102.)

This Court has consistently upheld the exclusion of evidence aimed at contradicting legislative findings of fact, holding the exclusion not to present a federal constitutional question. If the legislature (as is the Cleveland City Council in our case), or an arm of the legislature made a finding of fact that was not in fact correct, fair or just, or perhaps even fraudulent, such would "not necessarily involve any question of a Federal nature," and to such objection the state court decision would be conclusive: *Lent v. Tillson*, 140 U. S. 316 at 334 (1891). The determination that a special benefit extends to certain property for the purposes of special assessment "is of necessity a question of fact, and when the legislature determines it in a case within its general power, its decision of course will be final," *Spencer v. Merchant*, 125 U. S. 345 at 353 (1888); such a determination, even in the face of an allegation that part of the property is not in fact benefited, "is a matter of detail with which this court cannot interfere, if it were clearly so * * *." *Davidson v. New Orleans*, 96 U. S. 97 at 106 (1878). And in *United States v. Twin City Power Co.*, 350 U. S. 222 at 224 (1956) this Court said:

> "It is not for courts, however, to substitute their judgments for congressional decisions on what is or is not necessary for the improvement or protection of navigation * * *."

A relevant case dealing in some detail with review of administrative—not even legislative—fact finding in the determination of the necessity of acquiring certain property by eminent domain is *United States v. Carmack*, 329 U. S. 230 (1946), reh. den. 329 U. S. 834 (1947). The district court dismissed the government's condemnation petition, on the basis of its finding that an official had acted capriciously and arbitrarily in selecting a site for the construction of a Federal post office. This Court held that the selection of the final site "out of 22 sites suggested, and out of two closely balanced alternatives, constituted an administrative and legislative decision not subject to judicial review on its merits" (p. 243), and concluded at page 247:

> "The finding of the District Court on the second trial that the selection of the park site 'amounts in law to an arbitrary and unnecessary act' appears, from the context, to have been a finding largely of the comparative undesirability and lack of necessity for the selection of that site and not to have been a finding that the selection had been made without adequate determining principle and without reason. The comparative desirability and necessity for the site were matters for legislative or administrative determination rather than for a judicial finding."

Perhaps the best statement of the rule that courts will not review legislative findings of facts, and the reasons therefor, is made by Mr. Justice Brewer in *United States v. Des Moines Navigation and Railway Company*, 142 U. S. 510 (1892), a case in which the validity of a state statute was attacked:

> "* * * The knowledge and good faith of a legislature are not open to question. It is conclusively presumed that a legislature acts with full knowledge, and in good faith. It is true the bill alleges that its

passage was induced by the navigation company, by false representations and threats of suits; but such an allegation amounts to nothing. In Cooley's Constitutional Limitations, (5th ed. 222), the author, citing several cases, observes: 'From what examination has been given to this subject, it appears that whether a statute is constitutional or not is always a question of power; that is, a question whether the legislature in the particular case, in respect to the subject matter of the act, the manner in which its object is to be accomplished and the mode of enacting it, has kept within the constitutional limits and observed the constitutional conditions. In any case in which this question is answered in the affirmative, the courts are not at liberty to inquire into the proper exercise of the power. They must assume that legislative discretion has been properly exercised. If evidence was required, it must be supposed that it was before the legislature when the act was passed; and if any special finding was required to warrant the passage of the special act, it would seem that the passage of the act itself might be held to be equivalent to such finding. And, although it has sometimes been urged at the bar that the courts ought to inquire into the motives of the legislature where fraud and corruption were alleged, and annul their action if the allegations were established, the argument has in no case been acceded to by the judiciary, and they have never allowed the inquiry to be entered upon.' See also *Fletcher v. Peck*, 6 Cranch, 87; *Ex parte McCardle*, 7 Wall. 506; *Doyle v. Continental Insurance Co.*, 94 U. S. 535; *Powell v. Pennsylvania*, 127 U. S. 678" (at pp. 544-5.)

None of the cases cited by Appellant are relevant, for none advert to any constitutional issue relative to the exclusion of evidence. And all are distinguishable on additional bases. *Mumpower v. Housing Authority of City of Bristol*, 176 Va. 426, 11 S. E. (2d) 732 (1940), was not an

eminent domain case, the question being whether under the police power the state could create a public housing authority. Appellant reads into *Schenck v City of Pittsburgh*, 364 Pa. 31, 70 A. 2d 612 (1950), a statement that judicial review may be had via evidence adduced at the trial; we can find no such allusion, although the court does state in dictum at page 614 that review might be available in cases of fraud or palpable bad faith.

Four of Appellant's cases are further distinguishable as involving the question whether administrative agencies had exceeded their statutory power. *Bahr Corporation v. O'Brion*, 146 Conn. 273, 149 A. 2d 691 (1959); *Gohld Realty Co. v. City of Hartford*, 141 Conn. 135, 104 A. 2d 365 (1954); *Board of Water Comm'rs v. Johnson*, 86 Conn. 151, 84 A. 727 (1912); *Bristol Redevelopment and Housing Authority v. Denton*, 198 Va. 171, 93 S. E. 2d 288 (1956). Another case cited, *Connecticut College for Women v. Calvert*, 87 Conn. 421, 88 A. 633 (1913), held that the legislature had no power to delegate to a private college the powers of eminent domain, and so is completely irrelevant.

Appellant's quotation from *Offen v. City of Topeka*, 186 Kans. 389, 350 P. 2d 33 (1960), has more meaning in context. There the court merely overruled a demurrer to the petition alleging arbitrary and capricious action; there was no ruling upon the admissibility of evidence.

Appellant does not, and can not, cite any case elevating a court's refusal to admit evidence to contradict legislative findings of fact to the level of a constitutional right; to the contrary, the cases cited above by Appellees hold that there is no such right. And so here Appellant has not raised a Federal question.

Approaching the issue differently, if as discussed in the next section Appellant was not constitutionally entitled

to notice and hearing and the opportunity to present facts before the Cleveland legislative body made its determination, by a parity of reasoning she is not constitutionally entitled subsequently to attack in the courts those legislative findings of facts.

C. THE OTHER QUESTIONS RAISED BY APPELLANT AND PASSED ON BY THE OHIO COURTS ARE SO UNSUBSTANTIAL AS TO NOT REQUIRE ANY FURTHER ARGUMENT.

1. Appellant Was Not Constitutionally Entitled to Notice and an Opportunity to be Heard Before the City's Legislative Body Made its Findings of Fact and Determined the Necessity of Appropriating Property in the Erieview Area.

Appellant raises a due process objection to the failure to give her notice and opportunity to be heard before the City Council made its findings, determined the necessity of clearance and redevelopment of the Erieview area as a slum, blighted, deteriorated and deteriorating area, and adopted the Erieview plan. [Appellant received the ten-day notice of the Planning Commission hearing mailed to property owners as required by § 1.5104 of the Cleveland urban renewal legislation (Jurisdictional Statement, page 9). A recommendation by that Commission is required by the Cleveland legislation (§§ 1.5104, 1.5105—Appendix A herein) as a necessary condition precedent to the action of the Cleveland City Council of which Appellant complains. That notice of the Commission hearing, even if constitutionally required, satisfied due process requirements. *Hanover National Bank v. Moyses*, 186 U. S. 181 (1902); *Goodrich v. Ferris*, 214 U. S. 71 (1909).] Existing procedural requirements contained in the local renewal legislation, § 1.5105 of the Codified Ordinances of Cleveland (Appen-

dix A herein), do not require a hearing before the legislative body, the Council, makes its findings of fact and adopts the plan. Nor is such a hearing required by due process.

None of the cases relied on by Appellant involve the legislative determination of necessity in eminent domain procedure. In particular, the case of *State of Washington ex rel. Oregon Railroad and Navigation Co. v. Fairchild*, 224 U. S. 510 (1912), the basis for Appellant's discussion of this question at pages 35-38 of her Jurisdictional Statement, is totally inapplicable, involving as it did the exercise of delegated police power by an administrative agency having the effect of taking property without compensation.

Many decisions of this Court, which Appellant chooses to ignore, hold that due process does not require notice and hearing before the legislative determination of the necessity of the taking, and that due process is satisfied when the owner receives notice and hearing in the proceeding to appropriate his property, as Appellant has in this case in the separate appropriation action. The rule was stated by this Court in *Rindge Company v. County of Los Angeles*, 262 U. S. 700 at 709 (1923):

> "* * * And so construed this statute is not in conflict with the Fourteenth Amendment, either because it fails to provide for a hearing by the landowners before such resolution is adopted, or otherwise. The necessity for appropriating private property for public use is not a judicial question. This power resides in the legislature, and may either be exercised by the legislature or delegated by it to public officers. 'Where the intended use is public, the necessity and expediency of the taking may be determined by such agency and in such mode as the State may designate. They are legislative questions, no matter who may be charged with their decision, and a hearing thereon is not essential to due process in the sense of the Four-

teenth Amendment.' *Bragg v. Weaver*, 251 U. S. 57, 58. 'That the necessity and expediency of taking property for public use is a legislative and not a judicial question is not open to discussion. * * * Neither is it any longer open to question in this Court that the legislature may confer upon a municipality the authority to determine such necessity for itself. * * * The question is purely political, does not require a hearing, and is not the subject of judicial inquiry.' *Joslin Mfg. Co. v. Providence, ante*, 668."

In *Sears v. City of Akron*, 246 U. S. 242 (1918), the Court stated:

> "Plaintiff contends that the ordinance is void because the general statute which authorized the appropriation violates both Article I, § 10, of the Federal Constitution and the Fourteenth Amendment, in that it authorizes the municipality to determine the necessity for the taking of private property without the owners having an opportunity to be heard as to such necessity; that in fact no necessity existed for any taking. * * * It is well settled that while the question whether the purpose of a taking is a public one is judicial, * * * the necessity and the proper extent of a taking is a legislative question." (at p. 251.)

Even in the relatively novel context of the elimination of blight conditions Appellant's argument has been held to be without merit. For example, in *Robinette v. Chicago Land Clearance Commission*, 115 F. Supp. 669 (N. D. Ill., 1951), the court ruled that "The hearing, therefore, in the suit in which it is sought to acquire property by eminent domain * * * fulfills all the requirements of due process of law" (at 673). And in *Wilson v. City of Long Branch*, 27 N. J. 360, 142 A. 2d 837 (1958), cert. den. 358 U. S. 873 (1958), the New Jersey Supreme Court stated:

> "It seems plain that so far as the investigation of the matter of blight is concerned, the demands of due

process did not call for a hearing at all. * * * That determination might constitutionally have been left for *ex parte* action by the governing body or the planning board." (142 A. 2d at 851.)

2. The Acquisition of the Erieview Area, Including Appellant's Property, Is for a Public Purpose and Use.

Appellant's claim that the acquisition of her property is for a private purpose in violation of the United States Constitution does not present any substantial federal question, for this exercise of legislative power by the home-rule City of Cleveland clearly falls under the constitutional aegis of several decisions, among others, of this Court—*Berman v. Parker*, 348 U. S. 26 (1954); *United States ex rel. Tennessee Valley Authority v. Welch*, 327 U. S. 546 (1946); *Burt v. Pittsburgh*, 340 U. S. 802 (1950); *Starr v. Nashville Housing Authority*, 354 U. S. 916 (1957).

This appeal does not present an isolated instance of a declaration by a single state of a novel public purpose and use. Congress, acting as the legislature for the District of Columbia, has declared the public need for blight elimination and urban redevelopment in the Capital (60 Stat. 790 (1946), as amended 72 Stat. 1102 (1958)); area redevelopment thereunder has been approved by this Court. *Berman v. Parker, supra.* And Congress, in enacting the slum and blight clearance and urban renewal law (42 U. S. C. §§ 1441-1462) under which the Erieview plan is being executed, found that the national welfare required that metropolitan areas throughout the country undertake the elimination of existing slum and blighted conditions (as Cleveland is doing in this case) and the prevention of the occurrence of those conditions. At least 45 state legislatures have enacted statutes similar to the Cleveland urban renewal "statute" (Appendix A), declaring that the

elimination, and the prevention, of conditions of blight and deterioration as defined in Section 1.5102 of the Cleveland ordinances, constitutes a public purpose. Those state statutes, and particular projects thereunder, have been held constitutional by this Court in *Burt v. City of Pittsburgh* and *Starr v. Nashville Housing Authority, supra,* and by the courts in 30 states, and disapproved in only one, South Carolina. Those state cases are cited in Appendix B herein.

This tide of state and federal legislative and judicial determinations should not be ignored by this Court, which repeatedly has asserted that a local legislative determination of public use, particularly when approved by the state courts, is entitled to the greatest deference.

At the outset Appellant's misconception of the public purpose question, urged in the Ohio courts and carried over into her Jurisdictional Statement, must be corrected. The question is not whether Ordinance No. 2428-60 (quoted by Appellant as App. F) or any other element of the Erieview plan alone, provides for a public purpose. Instead, the question is whether the acquisition of any area described in Section 1.5102 of the Cleveland Codified Ordinances is for a public purpose. That procedural ordinance, adopted in 1955, is set forth in full in Appendix A herein and was Joint Exhibit A before the trial court. Section 1.5102 (quoted above at page 2) of the basic urban renewal "statute" enacted by the home-rule City of Cleveland under power directly granted to it by the Ohio Constitution, states that an area shall be determined to be a blighted or deteriorated area if certain enumerated conditions are found to exist. It was under this ordinance that the Council made its findings and adopted the Erieview Plan.

Council, the legislative body, had before it when it made its findings of fact its own knowledge, and the findings of the City Planning Commission which in turn were based on reports by city inspectors, officials and special consultants. Council thereupon in Ordinance No. 2428-60 (Appellant's Appendix F) determined the Erieview area to be blighted, deteriorated and deteriorating. Subsequently Council made detailed findings of fact in Section 1 of Ordinance No. 449-61 (Defendants-Appellees' Exh. B in the trial court), adopted February 20, 1961, approving the Loan and Capital Grant Agreement with the Housing and Home Finance Agency. That section, quoted above at page 3, expressly accepted the Urban Renewal Director's report (Defendant-Appellees' Exh. B-2 in the trial court) summarizing the findings of the building inspectors and special consultants and the Planning Commission, and in addition found that:

> "* * * the Erieview I Project (Ohio R-36) area is not only a blighted, deteriorated, and deteriorating area but is also a slum area detrimental to and a menace to the public safety, health, morals, and general welfare most particularly of the thousands of people who live in, work in, own property in, and otherwise use the project area and immediate vicinity, as well as the people of the City of Cleveland because an overwhelming preponderance of the structures in the project area is detrimental to the public health, safety, and welfare by reason of age, dilapidation, overcrowding, faulty arrangement, lack of ventilation or sanitary facilities, mixture of incompatible land uses as is evidenced by the failure of said structures to conform to the provisions of the Codified Ordinances of the City of Cleveland relating to building, housing and sanitation, unsafe conditions, deterioration of site improvements and other conditions which endanger life and property by fire or other causes * * *."

The trial judge in the Common Pleas Court of Cuyahoga County and the three judges of the Court of Appeals of Cuyahoga County (opinions quoted as Appellant's Appendices A and C) found (1) that the acquisition of property in a blighted, deteriorated and deteriorating area as defined by Section 1.5102 of the Ordinances of Cleveland is for a public purpose and for the public welfare, and (2) that the City Council, acting upon facts before it and following the ordinance procedure, had found the Erieview area to be such an area and had declared the necessity of acquiring the land in the area. The State Supreme Court dismissed Appellant's appeal, without opinion, as not presenting any debatable constitutional questions. (Two judges did not sign the dismissal, but did not express dissent.) With these legislative determinations, approved by the Ohio courts, Appellant disagrees.

It is a principle long established in this Court that its review, if indeed any, of local determinations of public use is most limited. It has held that the Fifth Amendment, relied upon by the Appellant, does not apply to state action. *Fallbrook Irrigation District v. Bradley,* 164 U. S. 112 at 158 (1896). Its limited review rule under the Fourteenth Amendment is best stated in a Fifth Amendment case, *United States ex rel. Tennessee Valley Authority v. Welch,* 327 U. S. 546 (1946), noting that a determination of public use by a state has never been overturned, a record which stands to date:

> "We think that it is the function of Congress to decide what type of taking is for a public use and that the agency authorized to do the taking may do so to the full extent of its statutory authority. *United States v. Gettysburg Electric R. Co.,* 160 U. S. 668, 679. It is true that this Court did say in *Cincinnati v. Vester,* 281 U. S. 439, 446, that 'It is well established that in considering the application of the Fourteenth

Amendment to cases of expropriation of private property, the question what is a public use is a judicial one.' But the Court's judgment in that case denied the power to condemn 'excess' property on the ground that the state law had not authorized it. And in *Hairston v. Danville & Western R. Co.*, 208 U. S. 598, 607, this Court, referring to the 'rule' later stated in the *Vester* case, said that 'No case is recalled where this court has condemned as a violation of the Fourteenth Amendment a taking upheld by the state court as a taking for public uses in conformity with its laws.' And see *Madisonville Traction Co. v. Mining Co.*, 196 U. S. 239, 257, 260-261. But whatever may be the scope of the judicial power to determine what is a 'public use' in Fourteenth Amendment controversies, this Court has said that when Congress has spoken on this subject 'Its decision is entitled to deference until it is shown to involve an impossibility.' *Old Dominion Co. v. United States*, 269 U. S. 55, 66. *Any departure from this judicial restraint would result in courts deciding on what is and is not a governmental function and in their invalidating legislation on the basis of their view on that question at the moment of decision, a practice which has proved impracticable in other fields.*" (At pp. 551-52; emphasis added.)

Paragraph 1 of the syllabus in *Rindge Company v. County of Los Angeles, supra*, a Fourteenth Amendment case, states the law:

"Whether a use for which private property is taken is public or private is a judicial question the determination of which is influenced by local conditions; and this Court, while enforcing the Fourteenth Amendment, should keep in view the diversity of such conditions, and regard with great respect the judgments of state courts upon what should be deemed public uses."

In its opinion in *Berman v. Parker*, 348 U. S. 26 (1954), this Court approved the area-wide concept of

urban redevelopment in the District of Columbia against the same attacks now made by Appellant, and held that the rights of property owners in a blighted area are satisfied when they "receive that just compensation which the Fifth Amendment exacts as the price of the taking" (at p. 36). At page 32 this Court described the virtual impregnability of the state or federal legislative determination of public use or public interest:

> "* * * Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia (see *Block v. Hirsh*, 256 U. S. 135) or the States legislating concerning local affairs. See *Olsen v. Nebraska*, 313 U. S. 236; *Lincoln Union v. Northwestern Co.*, 335 U. S. 525; *California State Association v. Maloney*, 341 U. S. 105. This principle admits of no exception merely because the power of eminent domain is involved. The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one. See *Old Dominion Co. v. United States*, 269 U. S. 55, 66; *United States ex rel. T. V. A. v. Welch*, 327 U. S. 546, 552."

It concluded at pp. 35, 36:

> "It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch. See *Shoemaker v. United States*, 147 U. S. 282, 298; *United States ex rel. T. V. A. v. Welch, supra*, 554; *United States v. Carmack*, 329 U. S. 230, 247."

In an earlier decision involving exactly the same type blighted area and the same objections as now before the Court, *Burt v. City of Pittsburgh*, 340 U. S. 802 (1950), this Court approved the acquisition of the appellant's property, located in a 23-acre commercial area in downtown Pittsburgh found to be blighted. In her injunction action in the District Court (N. D. Penn., No. 8706) Burt claimed that the commercial area was not blighted and that the finding of blight by the Redevelopment Agency and the City Council was arbitrary, capricious and without basis in fact, and that both the redevlopment plan and the statute under which it was adopted were unconstitutional as permitting the exercise of the power of eminent domain for private use. The findings held to justify the exercise of the power of eminent domain in *Burt* were far less explicit than in our case—the area was inadequately planned, had excessive land coverage and a faulty street and lot layout, and was being put to an economically and socially undesirable use.

In its unreported decision (quoted as Appendix A to the *Burt* Jurisdictional Statement) the three judge district court granted the defendant's motion to dismiss, finding nothing in the plaintiff's complaint or exhibits to sustain her constitutional objections. It noted that the Pennsylvania Supreme Court had earlier held the statute to be constitutional in *Belovsky v. Redevelopment Authority of the City of Philadelphia*, 357 Pa. 329, 54 A. 2d 277 (1947) and in *Schenck v. City of Pittsburgh*, 364 Pa. 31, 70 A. 2d 612 (1950) had upheld the constitutionality of the very same Pittsburgh plan.

On Burt's appeal, this Court granted the appellee's motion to affirm the dismissal, the *per curiam* decision at 340 U. S. 802 (1950) citing only *U. S. ex rel. T. V. A. v.*

Welch, supra. Thus twelve years ago this Court approved the exercise of eminent domain, in the face of the same constitutional objections, based on legislative determinations of fact and necessity similar to, and indistinguishable in theory from, those in our case.

Two other federal court urban renewal decisions further demonstrate the lack of substance of the issues raised by Appellant. Redevelopment of a 70 acre commercial area, together with a residential area, adjoining that involved in the *Berman* litigation, was approved in *Donnelly v. District of Columbia Redevelopment Land Agency*, 269 F. 2d 546 (D. C. Ct. App. 1959), cert. den. 361 U. S. 949 (1960), reh. den. 362 U. S. 914 (1960). All of the appellant's contentions, as stated in Judge Washington's opinion for the unanimous Court of Appeals, had "been answered by the Supreme Court in *Berman v. Parker*, * * * and that by reason of that decision we are bound to reject them. No doubt there are limits to what can be done in the name of 'redevelopment,' but those limits —as set by the Berman case—have not been exceeded here" (at p. 547). The second important case is *Starr v. Nashville Housing Authority*, 145 F. Supp. 498 (M. D. Tenn. 1956), affirmed *per curiam* at 354 U. S. 916 (1957), citing only *Berman v. Parker, supra.* The Court there upheld the constitutionality of the acquisition of the plaintiff's commercial property (found by the district court not itself to be blighted) for the purpose of eliminating blighted conditions in an area and redeveloping the area for purely commercial use.

Appellant argues that redevelopment by private enterprise, required by the federal law (28 U. S. C. § 1455 (a) (ii)) and the Cleveland procedural ordinance (§ 1.-5105, Appendix A herein), renders the acquisition of prop-

erty, and in particular hers, in the Erieview area a taking for a private use. This is untenable in the face of this Court's pronouncement in *Berman v. Parker, supra,* at 33-4:

> "* * * Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine. Here one of the means chosen is the use of private enterprise for redevelopment of the area. Appellants argue that this makes the project a taking from one businessman for the benefit of another businessman. But the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established. See *Luxton v. North River Bridge Co., supra; cf. Highland v. Russell Car Co.*, 279 U. S. 253. The public end may be as well or better served through an agency of private enterprise than through a department of government—or so the Congress might conclude. We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects."

The same argument was held to be without merit in the first Ohio urban redevelopment case, *State ex rel. Bruestle v. Rich*, 159 Ohio St. 13, 110 N. E. 2d 778 (1953), holding that the elimination and the prevention of the recurrence of conditions of blight was a public purpose, and that redevelopment by private enterprise was the means to that end selected by the legislature in the exercise of its discretion. The same objection has been made and rejected in the other state court decisions cited in Appendix B, as well as in this Court in *Starr v. Nashville Housing Authority* and *Burt v. City of Pittsburgh, supra.*

Seeking to evade the effect of these myriad holdings the Appellant urges as novel the fact that the City had entered into a contract to sell her land to a private rede-

veloper before it had acquired the parcel from her. This is neither a novel nor a distinguishing fact. It is but a detail in the legislative determination of the means of carrying out the public purpose. If citation be necessary, the precise question has been before this Court, and rejected. In support of her private use argument the appellant in *Burt v. City of Pittsburgh, supra*, urged the fact that on the same day the Pittsburgh City Council approved the redevelopment plan it also approved the proposed contract with the private redeveloper; subsequently, and still before the city took action to acquire her property, the Pittsburgh Urban Redevelopment Authority and the private redeveloper entered into a contract obliging the Authority to acquire the blighted area and to give title immediately to the redeveloper. As an extenuating fact, not present in our case, it was not public money, but the money of the private redeveloper that would be used by the Authority to pay for property acquired. (These facts are from Appellant Burt's Statement as to Jurisdiction, p. 10.) This Court affirmed the district court's dismissal of Burt's injunction action.

CONCLUSION.

If it were to assume jurisdiction of this appeal this Court would be asked to review the legislative and judicial determinations of the State of Ohio that the elimination of blighted urban areas and their redevelopment to prevent recurrence of the conditions of blight is a public purpose and use. Further, the Court would be called upon to review the determination of the particular area to be redeveloped, which determination was made by the Cleveland City Council exercising legislative powers granted directly to it by the state constitution.

It is respectfully submitted that the questions that are properly before this Court have all previously been answered adversely to the Appellant by this Court, and so the appeal presents no substantial federal question. Therefore Appellees' motion to dismiss this appeal should be granted.

Respectfully submitted,

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APPENDIX A.

Section 1.3102-1.5108, Codified Ordinances of the City of Cleveland—The Urban Renewal "Statute" Under Which the City's Legislative Body Has Acted.

§ 1.5102 AREA RENEWAL, REHABILITATION AND CONSERVATION.

When the City Planning Commission, as a result of investigation and study, at the request of the Mayor or the Council, or upon its own initiative, has determined the existence of a blighted, deteriorated or deteriorating area within the City, it shall prepare a renewal plan for such area which shall be designated "Urban Renewal Plan for Area" * * *

The Urban Renewal Plan for such area may involve slum clearance and redevelopment, or rehabilitation or conservation, or any combination or part thereof. An area shall be determined to be a blighted or deteriorated area if (1) a preponderance of the structures therein is detrimental to the public health, safety or welfare by reason of age, dilapidation, over-crowding, faulty arrangement, lack of ventilation or sanitary facilities, or any combination of these factors, and which is detrimental to the public health, safety or welfare because a preponderance of structures within said area fails to conform in one or more respects to the provisions of the Codified Ordinances of the City of Cleveland relating to building, housing and sanitation; or (2) there is a predominance of defective or inadequate street layout, or faulty lot layout in relation to size, adequacy, accessibility or usefulness, or unsanitary or unsafe conditions, or deterioration of site improvements, or conditions which endanger life or property by fire or other causes.

An area shall be determined to be a deteriorating area requiring rehabilitation and conservation if such area, whether within or apart from a blighted or deteriorated area, within the corporate limits of the City contains obsolete or sub-standard structures, or incompatible land uses, or both, which substantially impair or arrest the sound growth of the area, retard the provision of necessary housing accommodations or constitute an economic or social liability or a danger to the public health, safety, morals or general welfare, in its present condition and use.

"Rehabilitation" or "Conservation" for the purposes of this chapter may include but shall not be limited to the restoration and renewal of a deteriorating area by carrying out plans for a program of voluntary repair and rehabilitation of buildings or other improvements in accordance with the urban renewal plan.

The Cleveland Urban Renewal Agency shall cooperate and assist in the preparation of said plan and shall prepare a statement of a feasible method for the temporary relocation of families displaced from the development area, and that there are or are being provided, in the development area or other areas not less desirable in regard to public utilities and public and commercial facilities and at rents or prices within the financial means of the families to be displaced from the development area, decent, safe and sanitary dwellings for such displaced families.

(Ord. No. 2341-55. Passed October 17, 1955. Effective October 17, 1955.)

§ 1.5103 URBAN RENEWAL PLAN.

The Urban Renewal Plan for each Urban Renewal area shall conform to the general plan of Cleveland as adopted in 1949 by official action of the City Planning

Commission, pursuant to Section 76-2 of the Charter of the City of Cleveland, and as said general plan may be amended from time to time by said commission, and to the general development plan for the district of the City within which the Urban Renewal area lies, and with the workable program of the City for the elimination and prevention of slums and blight. The Urban Renewal plan shall include a description of the boundaries of the Urban Renewal area and any redevelopment, rehabilitation and conservation area constituting a part thereof, a land use plan showing location, character and extent of public and private land ownership, use, and occupancy proposed within the area. The plan shall define areas of land acquisition, demolition and removal of structures and of rehabilitation and conservation as may be proposed to be carried out in the urban renewal area; and shall include a statement of methods and standards under which the same is to be accomplished and the necessary controls to be applied in order to effect the rehabilitation and conservation by the owners of existing properties. The Urban Renewal Plan shall include a statement of the relationship of the plan to definite objectives of the City respecting appropriate land uses, improved traffic and transportation, public utilities, recreational and community facilities and other public improvements.

The Urban Renewal Plan shall include provision that every contract for the sale, lease, use or redevelopment of the property within such area shall contain such restrictions and conditions as are deemed necessary to prevent a recurrence of blighted or substandard areas, provided that no such restriction shall be based upon race, creed, or color; shall indicate what covenants, restrictions and conditions of such contracts shall be covenants run-

ning with the land; shall provide appropriate remedies for any breach of said covenants or conditions; shall provide that each redevelopment contract for the sale, lease, use or redevelopment of the property within such area, and each conveyance of land pursuant thereto shall contain conditions and covenants which shall run with the land which shall provide that there shall be no discrimination against or segregation of any person or group of persons based upon race, color, religion, national origin or ancestry in the sale, lease, sub-lease, transfer, occupancy, tenure or enjoyment of such land in perpetuity; and that such redevelopment contracts and conveyances of land within the area shall contain a covenant that no grantee himself, or any person claiming under or through him, shall establish or permit any such practice or practices or discrimination or segregation with reference to the selection, location, number, or occupancy of tenants, lessees, sub-lessees or vendees in any or all of the land within such area.

(Ord. No. 2341-55. Passed October 17, 1955. Effective October 17, 1955.)

§ 1.5104 Adoption of Plan.

The City Planning Commission after at least one public hearing shall adopt a plan for the renewal of the area described in such plan. Notice of such hearing shall be published once a week for two consecutive weeks in the City Record, and if required by regulation of the agency of the Federal Government concerned with the particular urban renewal area, in such additional manner as may be required. Such notice shall contain the time, place, date and purpose of such hearing, a description of the proposed renewal area, and shall state that the required documents comprising the Urban Renewal Plan are avail-

able at the place or places designated in said notice. Publication of said notice shall be commenced not less than fourteen (14) days prior to the public hearing and notice of such hearing shall be mailed to the last known owner of each parcel of land in the renewal area or at the last known address of such owners as shown by the records of the County Auditor, not less than ten (10) days prior to said public hearing. The public hearing may be adjourned from time to time without further notice. If after public hearing the boundaries of the Urban Renewal area are amended so as to include any property not included in the description of the proposed renewal area set forth in the notice of public hearing, further notice shall be given to the owners of such property in the same manner as for the original hearing. The City Planning Commission may amend any Urban Renewal Plan adopted in the same manner as said plan was originally adopted. Amendments as a result of public hearings shall not require further notice or additional public hearings.

(Ord. No. 2341-55. Passed October 17, 1955. Effective October 17, 1955.)

§ 1.5105 APPROVAL OF PLAN.

The Council upon receipt of the plan adopted as provided in Section 1.5104 shall cause the same to be received as a matter of permanent record and filed with the Clerk of Council to be made available for public inspection and information. Before the renewal plan for any area shall become effective the Council by ordinance shall approve said plan. The ordinance approving the plan submitted by the City Planning Commission shall include a finding and determination that the area is a blighted, deteriorated, or deteriorating area and that the plan has been adopted

in compliance with the provisions of Section 1.5104, is in conformity with the general plan of the City of Cleveland and the workable program for the elimination and prevention of slums and blight and with the requirements of Section 1.5103; that said plan will afford maximum opportunity consistent with the sound needs of the City as a whole for the rehabilitation, conservation or development of the Urban Renewal Area by private enterprise; and that the financial aid, if any, to be provided by the Federal Government is necessary to the execution of the plan. The approval by Council of the plan submitted by the City Planning Commission in its original form or as amended by Council, shall constitute the authority to expend general tax revenues, appropriated for such purpose, the proceeds of bonds authorized and issued for such purpose, and to accept gifts, donations, and grants from the Federal Government, the State of Ohio, other public bodies, or from any other entity or person. The standards and control embodied in said plan so adopted and approved shall thereupon become enforcible in the same manner as the ordinances of the City.

(Ord. No. 2341-55. Passed October 17, 1955. Effective October 17, 1955.)

§ 1.5106 PROSECUTION OF PLAN.

The Cleveland Urban Renewal Agency shall administer the plan adopted and approved as provided in this Chapter. If the ordinance approving said plan finds that assistance of the Federal Government is necessary to enable the project to be undertaken, including, but not limited to, the financing of the costs of acquisition, clearance and site improvement of the land within the renewal

area in accordance with said plan, the City of Cleveland shall have authority to make application to the Federal Government for such financial assistance and to do and perform such things and acts as may be necessary for such purpose. When authorized by ordinance of Council the Mayor shall execute any and all contracts on behalf of the Cleveland Urban Renewal Agency.

(Ord. No. 2341-55. Passed October 17, 1955. Effective October 17, 1955.)

§ 1.5107 DEMOLITION OF EXISTING BUILDINGS AND STRUCTURES.

It is hereby determined that the public improvement of the site clearance by the demolition of existing buildings and structures upon lands acquired, or in the process of being acquired, pursuant to the plan for the urban renewal of any area in the City of Cleveland shall be made by contract duly let to the lowest responsible bidder after competitive bidding for a gross price. More than one building, structure or premises may be included in the Invitation to Bid, and in such event, the bidders shall be asked to submit a proposal on each, all or any combination thereof. The specifications for such work shall provide that no building or structure shall be removed from the premises in whole or in substantially whole condition but shall be demolished on the premises; that the bidder shall furnish evidence of sufficient equipment and personnel for the speedy performance of the work; that the time for completion of the work shall be fixed by the City; and that the City reserves the right to limit the number of contracts awarded to any one bidder in order to insure the speedy completion of the site clearance of any urban renewal area. The Mayor is hereby authorized and directed to enter into such contracts

as are awarded by the Board of Control in conformity herewith.

(Ord. No. 951-57. Passed May 20, 1957. Effective May 22, 1957.)

§ 1.5108 RELOCATION OF INDUSTRY DISPLACED BY URBAN RENEWAL PROJECTS OR PUBLIC IMPROVEMENT.

When any urban renewal plan, in whole or in part, designates an area to be redeveloped for industrial use, priority in the sale of such land acquired or to be acquired by the City for such redevelopment shall be given in the following order:

1. To industry already located within the urban renewal area, for expansion.

2. To industry displaced or about to be displaced by any of the City's urban renewal projects.

3. To industry displaced or about to be displaced by any public improvement in the City of Cleveland.

4. To other industry desiring to locate within the particular project area.

The land acquired or to be acquired by the City for resale for industrial redevelopment may be sold without competitive bidding through direct negotiations with any industry qualifying under the above Priorities 1, 2, or 3 for a purchase price to be not less than the City's acquisition price, including court costs, title fees and the cost of advertising.

As to industry which does not qualify under the aforesaid Priorities 1, 2, or 3, land to be redeveloped for industrial use within the project area shall be sold in the manner and in accordance with the applicable terms and conditions relating to the sale of other project lands to be redeveloped.

The purchaser qualifying under the above Priorities 1, 2, or 3 shall sign a Project Agreement for all of the land he proposes to purchase and shall, concurrently with the signing of said Agreement, deposit the amount of the purchase price which he agrees to pay for the parcel or parcels then owned by the City, and as to parcels yet to be acquired by the City, shall deposit upon request an amount to be specified based on the appraised value thereof, and shall agree to deposit such additional sum or sums as may be required to complete the purchase price agreed to between the purchaser and the City when the acquisition cost to the City has been determined.

The Project Agreement shall be in form and manner substantially as required by the City for the disposition of land in urban renewal areas under which the purchaser agrees to redevelop the land in accordance with the approved Project Urban Renewal Plan.

No sale, pursuant to negotiation, of any land to industry qualifying under the hereinbefore described Priorities 1, 2 or 3 shall be made unless an advertisement for proposals shall first be published in the City Record for not less than two (2) successive weeks, and in a newspaper or newspapers of general circulation in the City of Cleveland for not less than thirty (30) days (once each week for four (4) successive weeks), prior to the date specified in such advertising for the receipt of such proposals.

The Project Agreement and the parcels will be awarded to the industry who, in the opinion of the Board of Control, will devote the land to the best industrial use in carrying out the approved Project Urban Renewal Plan.

(Ord. No. 2202-58. Passed November 24, 1958. Effective November 28, 1958.)

APPENDIX B.

Decisions in Thirty States Hold the Elimination of Conditions of Blight in Urban Areas, with Redevelopment by Private Enterprise, to Be a Public Purpose and Use.

Alabama:

Blankenship v. City of Decatur, 269 Ala. 670, 115 So. 2d 459 (1959); *Opinion of the Justices*, 254 Ala. 343, 48 So. 2d 757 (1950).

Arkansas:

Rowe v. Housing Authority of City of Little Rock, 220 Ark. 698, 249 S. W. 2d 551 (1952).

California:

Redevelopment Agency of City and County of San Francisco v. Hayes, 122 Cal. App. 2d 777, 266 P. 2d 105 (1954), hearing den. 1954, cert. den. 348 U. S. 897 (1954); *Fellom v. Redevelopment Agency of City and County of San Francisco*, 156 Cal. App. 2d 811, 320 P. 2d 884 (1958), hearing den. 1958, app. dism. 358 U. S. 56 (1958).

Colorado:

Rabinoff v. District Court in and for the City and County of Denver, 145 Colo. 225, 360 P. 2d 114 (1961).

Connecticut:

Gohld Realty Co. v. City of Hartford, 141 Conn. 135, 104 A. 2d 365 (1954); *Graham v. Houlihan*, 157 Conn. 321, 160 A. 2d 745 (1960), cert. den. 364 U. S. 833 (1960).

Delaware:

Randolph v. Wilmington Housing Authority, 139 A. 2d 476 (1958).

Florida:

Grubstein v. Urban Renewal Agency of City of Tampa, 115 So. 2d 745 (1959).

Georgia:

Bailey v. Housing Authority of City of Bainbridge, 214 Ga. 790, 107 S. E. 2d 812 (1959). (After state constitutional amendment)

Illinois:

Zurn v. City of Chicago, 389 Ill. 114, 59 N. E. 2d 18 (1945); *Chicago Land Clearance Commission v. White*, 411, Ill. 310, 104 N. E. 2d 236 (1952).

Indiana:

Alanel Corporation v. Indianapolis Redevelopment Commission, 239 Ind. 35, 154 N. E. 2d 515 (1958).

Kansas:

State ex rel. Fatzer v. Urban Renewal Agency of Kansas City, 179 Kan. 435, 296 P. 2d 656 (1956).

Kentucky:

Miller v. City of Louisville, 321 S. W. 2d 237 (1959).

Maine:

Crommett v. City of Portland, 150 Me. 217, 107 A. 2d 841 (1954).

Maryland:

Herzinger v. Mayor & City Council of Baltimore, 203 Md. 49, 98 A. 2d 87 (1953). (Expressly authorized by state constitution)

Massachusetts:

Papadinis v. City of Somerville, 331 Mass. 627, 121 N. E. 2d 714 (1954); *Despatchers' Cafe, Inc. v. Somerville*

Housing Authority, 332 Mass. 259, 124 N. E. 2d 528 (1955); *Bowker v. City of Worcester*, 334 Mass. 422, 136 N. E. 2d 208 (1956); *Worcester Knitting Realty Co. v. Worcester Housing Authority*, 335 Mass. 19, 138 N. E. 2d 356 (1956).

Michigan:

In re Slum Clearance in City of Detroit, 331 Mich. 714, 50 N. W. 2d 340 (1951).

Minnesota:

Housing and Redevelopment Authority of City of St. Paul v. Greenman, 255 Minn. 396, 96 N. W. 2d 673 (1959); *Asch v. Housing and Redevelopment Authority of City of St. Paul*, 256 Minn. 146, 97 N. W. 2d 656 (1959); *Housing and Redevelopment Authority in and for the City of Minneapolis v. Minneapolis Metropolitan Company*, 259 Minn. 1, 104 N. W. 2d 864 (1960).

Missouri:

State ex inf. Dalton v. Land Clearance for Redevelopment Authority of Kansas City, 364 Mo. 974, 270 S. W. 2d 44 (1954); *Land Clearance for Redevelopment Authority of City of St. Louis v. City of St. Louis*, 270 S. W. 2d 58 (1954). (Under express provision of state constitution.)

New Hampshire:

Velishka v. City of Nashua, 99 N. H. 161, 106 A. 2d 571 (1954).

New Jersey:

Sorbino v. City of New Brunswick, 43 N. J. Super. 554, 129 A. 2d 473 (1957); *Wilson v. City of Long Branch*, 27 N. J. 360, 142 A. 2d 837 (1958), cert. den. 358 U. S. 873 (1958). (Both cases decided under express state constitutional provision.)

New York:

Murray v. LaGuardia, 291 N. Y. 320, 52 N. E. 2d 884 (1943), cert. den. 321 U. S. 771 (1944); *Kaskel v. Impelliteri*, 306 N. Y. 73, 115 N. E. 2d 659 (1953), reh. den. 306 N. Y. 609, 115 N. E. 2d 832 (1953), cert. den. 347 U. S. 934 (1954). (Both cases decided under constitutional provision on subject).

North Carolina:

Redevelopment Commission of Greensboro v. Security National Bank of Greensboro, 252 N. C. 595, 114 S. E. 2d 688 (1960).

Ohio:

State ex rel. Bruestle v. Rich, 159 Ohio St. 13, 110 N. E. 2d 778 (1953); *Teresa Grisanti v. City of Cleveland*, 18 Ohio Op. 2d 143, 179 N. E. 2d 798 (Cuyahoga County Common Pleas, 1961), aff'd 89 Ohio L. Abs. 1, 181 N. E. 2d 299 (Cuyahoga County Court of Appeals, 1962), app. dism. 173 Ohio St. 386, 182 N. E. 2d 568 (1962).

Oregon:

Foeller v. Housing Authority of Portland, 198 Ore. 205, 256 P. 2d 752 (1953).

Pennsylvania:

Belovsky v. Redevelopment Authority of City of Philadelphia, 357 Pa. 329, 54 A. 2d 277 (1947); *Schenck v. City of Pittsburgh*, 364 Pa. 31, 70 A. 2d 612 (1950).

Rhode Island:

Opinion to the Governor, 76 R. I. 249, 69 A. 2d 531 (1949); *Ajootian v. Redevelopment Agency of City of Providence*, 80 R. I. 73, 91 A. 2d 21 (1952) (Both cases decided before state constitutional amendment expressly permitting.)

Tennessee:

Nashville Housing Authority v. City of Nashville, 192 Tenn. 103, 237 S. W. 2d 946 (1951).

Texas:

Davis v. City of Lubbock, 160 Tex. 38, 326 S. W. 2d 699 (1959).

Virginia:

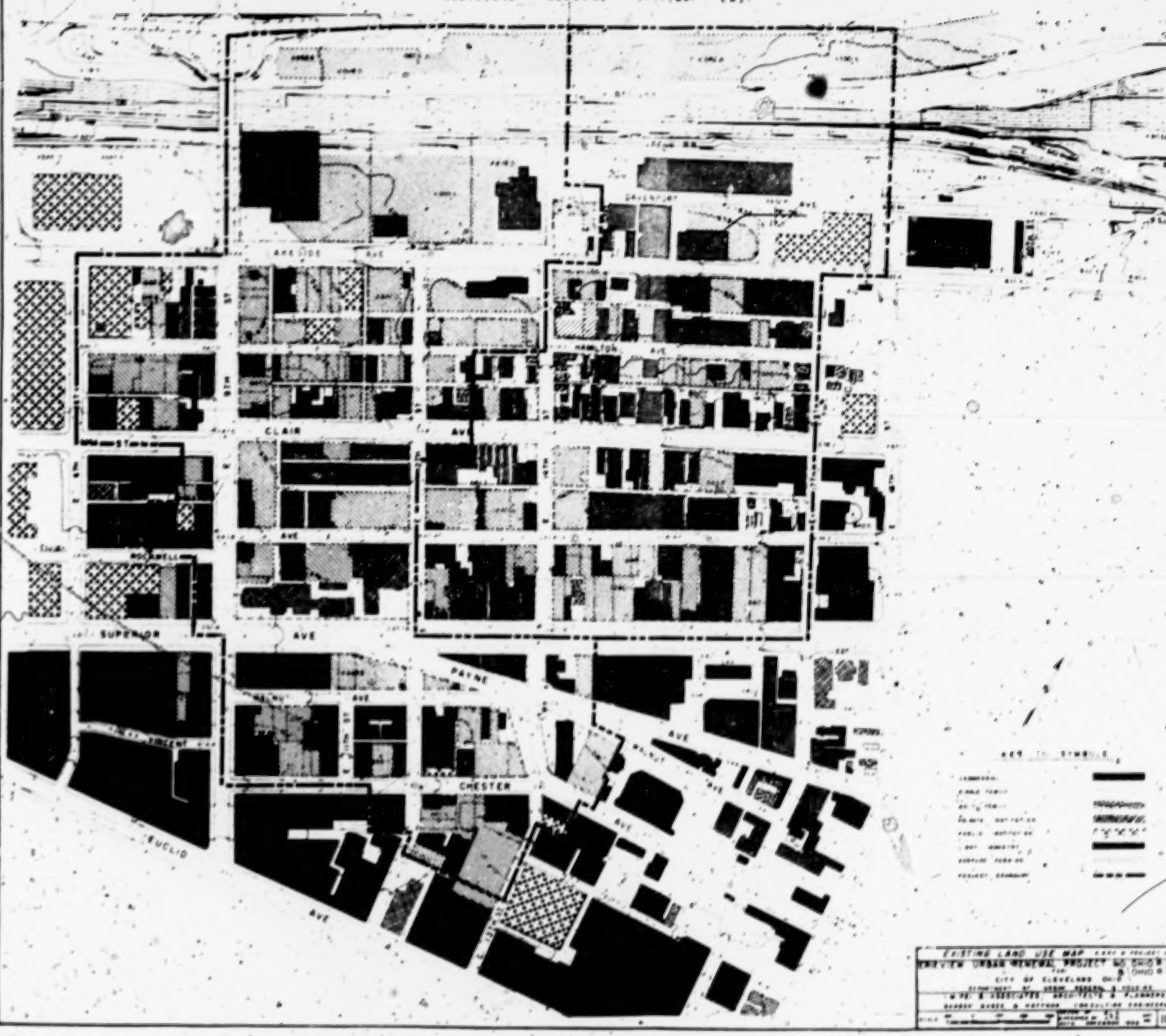
Hunter v. Norfolk Redevelopment & Housing Authority, 195 Va. 326, 78 S. E. 2d 893 (1953).

Wisconsin:

David Jeffrey Co. v. City of Milwaukee, 267 Wis. 559, 66 N. W. 2d 362 (1954).

APPENDIX C.

Existing Land Use Map—Erieview-I Urban Renewal Area.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In the Supreme Court of the United States

No. 353.

OCTOBER TERM, 1962.

TERESA GRISANTI, *etc.*,

Plaintiff-Appellant,

vs.

THE CITY OF CLEVELAND, *et al.*,

Defendants-Appellees.

APPEAL FROM THE SUPREME COURT OF OHIO AND FROM THE COURT OF APPEALS OF CUYAHOGA COUNTY, OHIO.

BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL.

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THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-9647

In the Supreme Court of the United States

No. 353.

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BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL.

The Council's determination was not a matter of discretion but of fact-finding and is a proper subject of Judicial Review.

More than five years prior to the passage of Cleveland Ordinance No. 2428-60, creating Erieview I, the Council of the City of Cleveland enacted the Urban Renewal "Statute." This enactment, which is contained in Codified Ordinances of the City of Cleveland, Section 1.5102-1.5108, outlines the conditions necessary for a determination that an area is blighted. This enactment was indeed one of discretion which would not be subject to judicial review. It is such discretionary acts which are referred to in the various cases cited by Appellees. (Appellees' Motion to Dismiss, pp. 14-17.) *Village of South Euclid v. Bilkey*, 126 O. S. 505, concerned the fixing of compensation for village officers; *State, ex rel. Kittel v. Bigelow*, 138 O. S.

497, concerned the submission of a proposed charter amendment to the electorate; *Railroad Co. v. Defiance*, 52 O. S. 262, concerned the removal of a bridge at a railroad crossing; *Lent v. Tillson*, 140 U. S. 316, concerned the levying of assessments; *U. S. v. Carmack*, 329 U. S. 320, concerned the selection of a site for a Federal post office. *All* of these cases, cited by the appellees, concern legislative and administrative enactments based upon *discretion*. None of them is concerned with a pure finding of fact, using a prior "guiding" ordinance such as exists here. There is certainly good reason not to disturb discretionary legislative acts. But to say that a council's finding that black is white may not be reviewed is really to maintain that the people have no redress to the courts from any legislative abuse of discretion.

Conversely, appellees contend that the cases relied upon by appellant in her Jurisdictional Statement, such as *Mumpower v. Housing Authority of the City of Bristol*, 176 Va. 426, 11 S. E. (2) 732 and *Schenk v. City of Pittsburgh*, 364 Pa. 31, 70 A. 2nd 612, are irrelevant or distinguishable. (Appellees' Motion to Dismiss Appeal, pp. 17-18.) All of these cases are concerned with a review by various courts of legislative and administrative proceedings, which appellees contend is never done. And the contention that same are not cases of eminent domain does not alter this fact.

Appellees would contend that the only question raised by the appellant is the "wisdom" of Council in deciding that this area, known as Erieview I, was blighted. Such is *not* the fact. It is the appellant's contention that not "wisdom" but facts are at issue in deciding a question of blight and the City's findings are certainly reviewable by the courts. *Sargent v. City of Cincinnati*, 110 Ohio St. 444, 144 N. E. 132.

The Appellees never questioned the plaintiff's right to seek to enjoin the city's action as being a gross abuse of discretion. However, when the plaintiff attempted to prove that which she had alleged in her petition, appellees objected to the introduction of any evidence bearing upon the existence or non-existence of blight—even though this was the only way for plaintiff to prove the allegation raised in her petition.

If the Appellees are correct in their contention, it would appear to be the law that one may petition the court for redress of wrongs committed by legislative bodies through abuse of discretion, but, upon trial, may not introduce evidence to prove such allegations. It is not plaintiff's contention that a court may substitute its "wisdom" for that of a legislative body. Such has never been the law. But that the courts *do* have the right to review legislative decisions on questions of fraud, bad faith and abuse of discretion has certainly never been questioned before. *Bahr Corp. v. O'Brion*, 146 Conn. 237, 149 A. 2d 691 (1959). Although it is noted that in a recent Law Review article, one of appellees' counsel has apparently already disqualified "abuse of discretion" as a ground for judicial review of legislative proceedings. *Western Reserve Law Review*, Vol. 13, No. 4, September, 1962, Crawford, *Land Use Control*.

Appellees contend that there is a difference between a court's examination of a legislative determination in police power cases, and its examination of legislative action in the field of public improvements. This may be true if such legislative action does not at the same time deprive a private citizen of his right to own and use his property as he sees fit.

It seems almost inconceivable to hold that a citizen's private property may be declared "blighted" and taken

from him by a governmental agency without *any* opportunity for him to show that neither it nor its surrounding area is indeed blighted. This right is in no wise an attempt to usurp the powers of the legislature. It is rather the only defense available to the property owner when a legislative body thus abuses its discretion.

The case of *U. S. vs. Carmack*, 329 U. S. 230 (1946) reh. den. 329 U. S. 834 (1947), is cited by appellees as one which holds that the courts may not review legislative decisions. Such is *not* the fact. What the court said, as is quoted by appellees in their Motion to Dismiss at page 16, is that the finding of the District Court, that the selection of the park site "amounts in law to an arbitrary and unnecessary act," was a finding based on "comparative undesirability—and *not to have been a finding that the selection had been made without adequate determining principle and without reason.*" (Emphasis added.) The Court then went on to say that the matters of comparative desirability and necessity for the site were ones of administrative determination and not for judicial finding. If the court had felt that no review of administrative determination would ever lie, it would not have inserted the italicized language. The Court obviously meant, not that the courts could not review legislative and administrative determinations, but rather that they needed other grounds than "comparative undesirability" to sustain an injunction.

Evidence as to the truth or falsity of legislative findings may be received where plaintiff's petition alleges abuse of discretion.

In the instant case, the Cuyahoga County Court of Appeals held that the courts could review the action of legislative bodies where such bodies had abused their discretion. (Appendix to Jurisdictional Statement, p. 38a.) This Court then goes on to hold that because there was some evidence offered by the City that the council had *not* abused its discretion, that this was sufficient ground for denying to the plaintiff the right to introduce other evidence that the Council *had* abused its discretion. The court's position that courts generally have the right to review legislative acts where abuse of discretion is charged, but that no evidence to support this charge may be introduced by the plaintiff is surely a paradox. It would seem that the plaintiff in such an action could always present evidence to show that the legislative determination had no basis in fact. And such statement of law was made by the trial court herein. (Jurisdictional Appendix p. 19a.)

The questions involved are not of rules of evidence, but of the inviolability of private property.

The Appellees' contention that no Federal Question is presented is predicated upon the peculiar logic that having been deprived of her right to present evidence, the appellant is left only with an evidentiary question. In a recent U. S. Supreme Court case (*Mapp v. Ohio*, 367 U. S. 643) a different question of "evidence" was raised; that of whether or not a state officer may testify as to items found in the defendant's home where such officer had not first obtained a search warrant. The Federal question there was the defendant's rights as guaranteed by the

4th Amendment. Certainly no one was heard to say that the matter was merely one of proper or improper introduction of evidence and, therefore, not a federal question.

CONCLUSION.

The problem of urban renewal is one which faces all large municipalities today. It is a problem which is difficult of solution and baffling in its complexities. It is a problem which has instilled a great fear into the hearts of municipal fathers for the very survival of their cities. But it is in just such climates as this that the rights of the individual are very often lost.

Respectfully submitted,

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In the Supreme Court of the United States

No. 253

OCTOBER TERM, 1962

THERESA CHIANTI, et al.,

Plaintiff-Appellant

vs.

THE CITY OF CLEVELAND, et al.,

Defendants-Appellees

APPEAL FROM THE SUPREME COURT OF OHIO AND FROM THE COURT OF APPEALS OF CUYAHOGA COUNTY, OHIO

APPENDIX TO APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS

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APPENDIX TO APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS.

Further review of the defendants-appellees' Motion to Dismiss Appeal, and, particularly, a review of Page 8 thereof, has impelled the submission of this appendix.

The statement that there were "negotiations between the appellant and her sons and the City" prior to the filing of the appropriation action is not true.

No such "negotiations" whatsoever were had.

The appellant and her sons flatly refused to enter into any such negotiations and resisted all proceedings directed to ultimately taking plaintiff's property. They have taken this position up to the present date for the sole and only reason that the attempted taking of plaintiff's property and the proceedings followed by the appellees in their attempt to do so were violative of plaintiff's constitutional rights—as fully outlined in her Jurisdictional Statement herein.

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